AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1329.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

AUGUSTA McBLAIR ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 28, 1887.

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1 *Original Bill of Complaint.*

To the hon. judges of the supreme court of the District of Columbia, sitting in equity:

Humbly complaining, shew unto your honors your orators, Augusta McBlair, wife of J. H. McBlair, who sues by her next friend, Wm. H. Philip, and Julia Ten Eyck, wife of John C. Ten Eyck, who brings this suit by her next friend, the said Wm. H. Philip, that John Gadsby, the father of said Augusta McBlair and Julia Ten Eyck, died in the District of Columbia in the year 1844, after having made and published his last will and testament, whereby he devised to trustees, to wit, his wife, Provey Gadsby, and his friends, James Eakin and Alex. McIntyre, and the survivors of them, the hereinafter-described real estate, among other property, in trust, after the expiration of twelve months from his death to permit his said daughters to receive the rents, issues, & profits of the lots of ground in Washington city known as lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, in square No. 78, for their sole and separate use and enjoyment, in equal moieties for life, respectively, so that neither said property nor the income thereof should be subject to the control or disposition of the respective husbands of his said daughters or responsible for their debts, &c.; and in case either of his said daughters should die leaving no issue living at the time of her death that the interest or estate of her so dying without issue should become forthwith vested in the survivor, in the same manner as her own moiety was before held and enjoyed; and in case both or
2 either of his said daughters should die leaving issue living at the time of her death then his said trustees should hold the property to the use of said issue, one moiety to the issue of each of said daughters; or in case one of them only should die leaving such issue, then, after the death of the other daughter, the whole of said property should vest in said issue in fee simple.

Your oratrixes shew that the contingency of the death of both of his said daughters without issue was not provided for by said testator, and, consequently, in that event said property will revert to his right heirs.

And your oratrixes further shew that said Alexander McIntyre survived the other trustees aforesaid and has since died, leaving as his heirs-at-law Laura E. Baker, wife of Clarence B. Baker; Mary E. MacDonald, wife of Stephen MacDonald; Jno. A. McIntyre, Mary Page, wife of Quincy L. Page; Delosia D. Davidson, Thomas H. Davidson, & Wm. A. McIntyre, an infant under twenty-one years of age, and that your oratrix, Augusta McBlair, has children—John G. McBlair, Virginia Smith, wife of —— Smith; J. H. McBlair, Jr., Julia I. McBlair, C. Ridgley McBlair, & S. Jackson McBlair, of whom said last two are minors under twenty-one years of age; that said Julia Ten Eyck has children—Augusta Ten Eyck, Julia Ten Eyck,

Jane Ten Eyck, May Ten Eyck, and John C. Ten Eyck, of whom the last three are minors under twenty-one years of age; that besides your oratrixes the said John Gadsby left as his heirs-at-law his son, Wm. Gadsby, and his daughters, Mrs. Ann Sophia Newton and Mrs. Margaret S. Chapman; that said Ann Sophia Newton has recently died, leaving as her heirs-at-law Albert Newton, Maria McCommick, and Margaret Wallach, wife of W. Douglas Wal-
3 lach, and said William Gadsby has died, leaving as his heirs-at-law Wm. Gadsby, Sallie Gadsby, Eakin Gadsby, and Mary Gadsby, of whom the last is a minor under twenty-one years of age.

Your oratrixes further shew that of the lots of ground aforesaid Nos. 8, 9, and 10 front upon north I street, in the city of Washington, and are improved by a substantial row of dwellings, six in number, and all the other lots are vacant and unimproved, except where partially occupied by outbuildings.

They further shew that said dwelling-houses are of considerable value, and if properly improved and modernized would yield a good income and revenue, which would enure to the benefit of all parties interested, but that at present they are much out of repair, old-fashioned, and unprovided with modern conveniences; that the vacant lots in the rear front upon K street north, and at present yield no income, but would sell, and it would be greatly for the advantage of all parties to make sale of said lots and apply the proceeds to the improvement of said dwelling-houses; that your oratrixes have not the means to make such improvements, the income now accruing to them from their father's estate being wholly inadequate to their support. An additional reason for such sale is that said vacant lots are burdensome to your oratrixes by reason of the heavy municipal taxes to which they are subject, so that their retention defeats the primary object of said testator, which was not to burden your oratrixes, but to provide them an ample revenue for their comfortable support.

4 They shew that they are without relief in the premises at common law, and can only have relief in your hon. court in pursuance of the act of Congress entitled "An act to authorize the circuit court of the District of Columbia to decree the sale of real estate in certain cases," approved August 18, 1856.

In tender consideration whereof, and forasmuch as your oratrixes are without relief save in your honorable court, and to the end that the said John G. McBlair, Virginia Smith, —— Smith, J. Hollins McBlair, Jr., Julia J. McBlair, C. Ridgley McBlair, A. Jackson McBlair, Augusta Ten Eyck, Julia Ten Eyck, May Ten Eyck, Jane Ten Eyck, John C. Ten Eyck, Albert Newton, Maria McCormick, Margaret Wallach (Maria Newton), Margaret S. Chapman, John A. McIntyre, Laura E. Baker, Mary E. McDonald, Mary Page, Delosia Davidson, Thomas H. Davidson, and William A. McIntyre may be made parties defendant thereto, and that your honors may decree a sale of said vacant lots for the object aforesaid, and may grant such other and further relief in the premises as may be just and equitable; all of which they humbly pray. May it please your honors, the

premises considered, to grant the usual writ of subpœna against said defendants; and they will ever pray.

WALTER S. COX,
Sol. for Complainant.

(Endorsed:) 1355, equity. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Bill. The clerk will file this and issue subpœna to August rules. W. S. Cox, sol. Filed July 30th, 1868. R. J. Meigs, clerk.

5 *Summons and Return of Marshal.*

In the Supreme Court of the District of Columbia, July 30th, 1868

AUGUSTA MCBLAIR *et al.*, Complainants,
against
JOHN G. MCBLAIR *et al.*, Defendants. } No. 1355, Equity Doc. 9.

The President of the United States — Laura E. Baker, Mary E. McDonald, John A. McIntyre, Mary Page, Delosia Davidson, Thomas H. Davidson, Wm. A. McIntyre, John G. McBlair, Virginia Smith, J. H. McBlair, Jr., Julia J. McBlair, C. Ridgely McBlair, A. Jackson McBlair, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, John C. Ten Eyck, Albert Newton, Maria McCormick, Margaret Wallach, Wm. Gadsby, Sallie Gadsby, Eakin Gadsby, Mary Gadsby, and Margaret S. Chapman, defendants:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

(Indorsed:) No. 1355, equity doc. 9. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Original spa. to answer. Issued July 30th, 1868. Ret'd Aug. 12, 1868. Not to be found, John G. McBlair, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, John C. Ten Eyck, Albert Newton, Margaret S. Chapman, Maria McCormick. Served all the other 18 def'ts. D. S. Gooding, marshal. August 12, 1868. Cox, P.

6 *Summons and Return of Marshal.*

In the Supreme Court of the District of Columbia, July 30th, 1868.

AUGUSTA MCBLAIR *et al.*, Complainants,
against
JOHN G. MCBLAIR *et al.*, Defendants.
} Equity No. 1355.

The President of the United States to Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, May Ten Eyck, and John C. Ten Eyck, defendants:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

(Indorsed:) No. 1355, equity. Augusta McBlair *vs.* Augusta Ten Eyck *et al.* Issued July 30th, 1868. Ret'd Oct. 4, 1875. Not to be found. D. T. Gooding, marshal. Aug. 10th, 1868. Return as to Augusta, Julia, Jane, May, and John C. Ten Eyck.

7 *Summons and Service Acknowledged by Certain Defendants.*

In the Supreme Court of the District of Columbia, July 30th, 1868.

AUGUSTA MCBLAIR *et al.*, Complainants,
against
JOHN G. MCBLAIR *et al.*, Defendants.
} Equity No. 1355.

The President of the United States to Laura E. Baker, Mary E. McDonald, John A. McIntyre, Mary Page, Delosia Davidson, Thomas H. Davidson, and Wm. A. McIntyre, defendants:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

(Indorsed:) No. 1355, equity. Augusta McBlair *et al. vs.* Laura E. Baker *et al.* Issued July 30th, 1868; ret'd Aug. 10th, 1875.

Service acknowledged for the within-named defendants.

ED. W. SWANN,
Sol'r for Def'ts, Laura E. Baker, Mary E. McDonald, Thos. A. McIntyre, May Page, Delosia Donaldson, Thos. H. Donaldson, Wm. A. McIntyre.

8 *Affidavit of W. S. Cox as to Non-Resident Defendants.*

Supreme Court of the District of Columbia.

AUGUSTA MCBLAIR *et al. vs.* JOHN G. MCBLAIR *et al.*

W. S. Cox, being duly sworn, says that, upon information and inquiry, he is satisfied that the defendants in this cause, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, May Ten Eyck, John C. Ten Eyck, and Mary E. MacDonald, reside out of the District of Columbia.

W. S. COX.

Sworn & subscribed before me Aug. 10, 1868.

R. J. MEIGS, *Clerk.*

(Indorsed:) 1355. Supreme court of the District of Columbia. No. 1355, equity docket 9. McBlair *vs.* Ten Eyck *et al.* Affidavit of absence of def'ts Ten Eyck. Filed Aug. 10, 1868. R. J. Meigs, clerk.

9 *Order of Publication as to Non-Resident Defendants.*

In the Supreme Court of the District of Columbia.

AUGUSTA MCBLAIR *et al.*
vs.
AUGUSTA TEN EYCK, JULIA TEN EYCK, JANE TEN EYCK, MAY TEN EYCK, JOHN C. TEN EYCK, and Others. } Equity, 1355.

On motion of the complainants, by W. S. Cox, their solicitor, it is by the court, this 12th day of August, A. D. 1868, ordered that the above-named defendants cause their appearance to be entered herein on or before the first rule day occurring forty days after this day; otherwise the cause will be proceeded with as in case of defendant.

GEO. P. FISHER,
Jus. S. C. D. C.

(Indorsed:) 1355, equity doc. 9. McBlair *et al. vs.* McBlair *et al.* Order publication. Order Book 1, p. 313 E, M. 3, p. 363. Filed Aug. 12, 1868. R. J. Meigs, clerk.

10 *Appearance Entered for Defendant, Margaret Wallach, Aug.* 14, 1868.

McBLAIR *vs.* NEWTON *et al.* } 1355, Equity Docket 9.

On motion of Jos. H. Bradley, Jr., Esq., his appearance is hereby entered for defendant, Margaret Wallach.

Aug. 14, 1868.

—— ——.

Order Book Supreme Court of the District of Columbia No. 1, folio 314.

11 *Decree Pro Confesso Against Resident and Non-Resident Defendants, Oct.* 6, 1868.

AUGUSTA McBLAIR *et al.* *vs.* TEN EYCK. } 1355, Eq. Docket 9.

On motion of W. S. Cox, solicitor for complainants, it is ordered that a *decree pro confesso* be, and is hereby, entered against all resident defendants served with process and against all non-resident defendants.

By the clerk: —— ——.

Order Book Supreme Court of the District of Columbia No. 1, folio 327.

12 *Order to Issue Commission to Get Answer of Infants.*

AUGUSTA McBLAIR *et al.* *vs.* TEN EYCK *et al.*, JOHN G. McBLAIR. } 1355, Eq. Doc. 9.

In this cause it is, on motion of complainants' sol., ordered, this 18th day of Nov., A. D. 1868, that a commission issue to John L. N. Stratton, Frederick Voorhees, and Jane Ten Eyck to take the answer of the infant defendant, John C. Ten Eyck, Jr., by guardian to be by them appointed, and that Edward Swann be appointed guardian *ad litem* for the infant defendants, William A. McIntyre, C. Ridgley McBlair, A. Jackson McBlair, and Mary Gadsby, to answer the bill of complaint.

A. B. OLIN, *J.*

(Indorsed:) 1355. Supreme court of the Dist. of Col. No. 1355, equity docket 9. McBlair *et al. vs.* McBlair *et al.* Order to issue commission to get answer of infant and appoint E. Swann guardian *ad litem* to infants Nos. 4, 5, 15, 20. Eq. M. 3, p. 435. Filed Nov. 18, 1868. R. J. Meigs, clerk.

13 *Commission to Get Infants' Answer. Report of Commission and Answer of Infants.*

In the Supreme Court of the District of Columbia, the 18 Day of Nov. 1868. In Equity.

AUGUSTA MCBLAIR *et al.*
v.
JOHN H. MCBLAIR *et al.*
} No. 1355, Docket 9.

The President of the United States to John L. N. Stratton, Frederick Voorhees, Jane Ten Eyck, Greeting:

Know ye that, because, by a special order of said court in the above-entitled case, you have been assigned to appoint a guardian for the defendant, John C. Ten Eyck, Jr., alleged to be under the age of twenty-one years, and by said guardian to take the answer of said infant defendant: These, therefore, are to empower you or any two of you to go to said defendant, if he cannot conveniently come to you, and appoint a guardian for said infant and take the answer of said infant, by such guardian, upon his oath or affirmation, to be administered by you or any two of you, and, having so done, you are to send the same, closed up under your seal, together with your certificate of your having appointed such guardian as aforesaid, to the said court without delay.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

14 We, whose names are hereunto subscribed, in pursuance of the foregoing commission to us directed, did, on the 21st day of November, 1868, cause John C. Ten Eyck, Jr., the infant in the said commission named, to come before us, at Mount Holly, in the county of Burlington, in the State of New Jersey, and we then and there assigned John C. Ten Eyck, of Mount Holly, N. J., the father of the said infant, to be his guardian to answer and defend this suit on his behalf; and the answer of the said John C. Ten Eyck, Jr., the said infant, was taken, and the said John C. Ten Eyck, as guardian, was duly sworn to the truth thereof at the time and place aforesaid and by virtue of the said commission.

Before us—

JOHN L. N. STRATTON,
FRED'R'K VOORHEES,
Commissioners.

The answer of John C. Ten Eyck, Jr., one of the defendants, to the bill of complaint of Augusta McBlair & others, complainants, filed against him and others in the supreme court of the District of Columbia, No. 1355, equity docket 9.

The said defendant says that he, the said infant, is under the age of twenty-one years, and that he claims such interest in the premises

as he is entitled to, and submits his said interest to the protection of this honorable court, and prays to be hence dismissed with reasonable costs.

J'N C. TEN EYCK, *Guardian.*

Subscribed and sworn before us the 21st day of November, 1868.

JOHN L. N. STRATTON,
FRED'R'K VOORHEES,
Commissioners.

[Endorsed:] 1355, eq. doc. 9. McBlair *et al. v.* McBlair *et al.* Commission to get infant's answer. Report of commission and answer of infant. Issued Nov. 18, 1868. Returned 1868. R. J. Meigs, clerk.

15 *Answer of Certain Defendants.*

The answer of John G. McBlair, Virginia Smith, J. H. McBlair, Jr., and Julia McBlair, Charles R. McBlair, to the bill of complaint of Augusta McBlair against them and others.

These respondents, saving and reserving, &c., admit the facts stated in said bill and consent to a sale of the property described in it as therein is prayed.

JOHN G. McBLAIR.
V. G. SMITH.
J. H. McBLAIR.
C. R. McBLAIR.
JULIA T. E. McBLAIR.

Sworn and subscribed before me this twenty-fourth day of November, A. D. 1868.

[SEAL.]

N. CALLAN,
Notary Public.

(Indorsed:) 1355, eq. doc. 9. Augusta McBlair *vs.* Ten Eyck. Answer of John G. McBlair, Jr., Virginia Smith, J. H. McBlair, Jr., and Julia McBlair. Filed Dec. 9, 1868. R. J. Meigs, clerk.

16 *Answer of Certain Defendants.*

The answer of Augusta McB. Ten Eyck, Julia G. Ten Eyck, Jane Ten Eyck, and May Ten Eyck to the bill of complaint of Augusta McBlair and others against them and others, in chancery exhibited.

These respondents, saving and reserving, &c., now answering said bill, say that they admit the facts stated in said bill as to the title to the property therein described and believe and admit that it would be to the advantage and benefit of all parties interested that said vacant lots should be sold and the proceeds reinvested, either in the man-

ner mentioned in said bill or in some good securities yielding an income, and accordingly they consent to such sale for said object.

Written this, &c.

AUGUSTA McB. TEN EYCK.
JULIA G. TEN EYCK.
JANE TEN EYCK.
MAY TEN EYCK.

(Indorsed:) 1355, eq. doc. 9. Answers of Augusta McB. Ten Eyck, Julia G. Ten Eyck, Jane Ten Eyck, and May Ten Eyck. Filed Nov. 30, 1868. R. J. Meigs, clerk.

17 *Affidavit of J. H. McBlair as to Absence of Certain Defendants.*

McBLAIR *et al. vs.* TEN EYCK *et al.*

Personally appears J. H. McBlair and makes oath according to law that Maria McCommick and Albert Newton, two of the defendants in this cause, reside out of the District of Columbia.

J. H. McBLAIR.

Sworn to and subscribed before me July 12th, 1869.

R. J. MEIGS, *Clerk.*

(Indorsed:) 1355. Supreme court of the Dist. of Col. No. 1355, equity docket 9. McBlair *v.* Ten Eyck *et al.* Affidavit of J. H. McBlair as to absence of certain defendants. Filed Jan. 12, 1869. R. J. Meigs, clerk.

18 *Order of Publication.*

In the Supreme Court of the District of Columbia, the 12th Day of May, 1869.

McBLAIR *et al.*
vs
MARIA McCOMMICK, ALBERT NEWTON, TEN EYCKS, *et al.* } No. —.

On motion of the sol. for complainants, by Mr. ——, it is ordered that the defendants, Maria McCommick & Albert Newton, cause their appearance to be entered herein on or before the first rule day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

A. B. OLIN, *J.*

True copy.
Test:

—— ——, *Clerk.*

(Indorsed:) 1355. Supreme court of the Dist. of Col. No. 1355, equity docket 9. McBlair *v.* Ten Eyck *et al.* Ord. pub. Eq. M. 3, p. 505. Filed Jan. 12, 1869. R. J. Meigs, clerk.

19 *Decree Pro Confesso Against Non-Resident Defendants and Cause Set for Hearing.*

McBLAIR *et al.*
vs.
GADSBY *et al.*
} 1355, Equity Doc. —,

MAY 4, 1869.

Upon the motion of W. S. Cox, Esq., solicitor, by Mr. Hanna, for complainants, it is, this 4th of May, 1869, ordered that a decree *pro confesso* be entered against non-residents, and this cause set for hearing against the defendants who have answered, and ordered upon the calendar of special term for May, 1869.

By the clerk: —— ——.

Order Book Supreme Court of the District of Columbia No. 1, folio 395.

20 *Order of Reference to C. Ingle, as Special Auditor.*

In the Supreme Court of the District of Columbia, at a Special Term, May 4th, 1869, Justice Olin, presiding.

AUGUSTA McBLAIR *et al.*
vs.
JOHN G. McBLAIR *et al.*
} No. 1355, Equity D. 9.

In this cause a decree *pro confesso* having been entered against the non-resident defendants, after one public auction, and also against the resident defendants who have been served with process and have made default, and the cause having been set for hearing as against the defendants who have answered upon bill and answers—

It is by the court, this fourth day of May, A. D. 1869, ordered that this cause be referred to C. Ingle, Esq., as special auditor, to inquire and report whether it will be expedient and for the benefit of all parties interested that the property described in the proceedings be sold, and that the prayer of the bill as to the application of the proceeds should be granted.

A. B. OLIN, *J.*

(Indorsed:) No. 1355, Eq. D. 9. McBlair *et al. vs.* Gadsby *et al.* Order of reference to C. Ingle as special auditor. Eq. M. 4, p. 92. Filed May 4, 1869. R. J. Meigs, clerk.

21 *Special Auditor's Report on Sale.*

In the Supreme Court of the District of Columbia.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.*
Equity No. 1355.

This cause has been referred to me to enquire and report whether it will be expedient and for the benefit of all parties interested that the property described in the proceedings be sold and the proceeds of such sale be applied to the improvement of the dwelling-houses mentioned in the bill.

I have taken the accompanying deposition of Major J. H. McBlair, the husband of one of the complainants. From his statement and from my own personal knowledge of the property, I have no hesitation in saying that the disposition of the property in the manner sought by the bill would not only be for the interest and advantage of all parties concerned, but would also enure to the improvement of the neighborhood in which it is located.

It is therefore recommended that the prayer of the bill be granted.

C. INGLE,
Special Auditor.

22 John Hollins McBlair, being duly sworn, deposes and says:

I know all the parties to this suit. They are the only heirs-at-law of the late John Gadsby, deceased, and of the late Alexander McIntyre, deceased. William A. McIntyre, Charles Ridgley McBlair, A. Jackson McBlair, Jane Ten Eyck, May Ten Eyck, John C. Ten Eyck, and Mary Gadsby are minors. The other parties are all of full age. I am acquainted with the property mentioned in the bill. Besides the lots in square No. 78, specified in the bill, lots numbered 20 and 21, in the same square, were included in the trust of John Gadsby's will. With that addition the allegations of the bill are correct. The dwelling-houses are in a very dilapidated state, and the complainants are without the means to make them even tenantable. I am the husband of the complainant, Mrs. Augusta McBlair. One of the houses is occupied by us. The aggregate income from the others is only $1,800, one of them, which rented for $700, being now vacant. Out of this the taxes on all the vacant lots have to be paid. If the houses were put in proper repair it would make a difference of $4,000 in the income. Of the unimproved lots, some front on 21st street and some on K street. The portion prayed to be sold is worth about $10,000. In my opinion, it would be for the interest and advantage of all parties concerned that the unimproved part of the property should be sold and the proceeds of sale be applied to the improvement of the dwelling-houses. Such also is the opinion of the parties themselves and of all the business men with whom I have conversed.

J. W. McBLAIR.

Sworn to and subscribed before me this seventh day of May, 1869
C. INGLE,
Special Auditor.

(Indorsed:) 1355, equity doc. 9. McBlair *vs.* Gadsby *et al.* Auditor's report on sale. Filed May 8, 1869. R. J. Meigs, clerk.

23 *Decree for Sale and Appointment of W. S. Cox Trustee, &c.*

Supreme Court of the District of Columbia.

AUGUSTIA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.*
} 1355, Equity D. 9.

This cause coming on to be heard on the auditor's report, filed the 8th inst., it is by the court, this 10th day of May, 1869, ordered, adjudged, and decreed that the property described in the bill and the auditor's report and deposition returned by him be sold, and that Walter S. Cox be, and he is hereby, appointed trustee to make such sale, and the manner and course of his proceedings shall be as follows, viz: He shall first file in this cause his bond to the United States in the penalty of eight thousand dollars, with security to be approved by this court or a judge thereof, conditioned for the due discharge of his duties as trustee under this and every future order and decree in this cause; he shall then proceed to make sale of said property at public auction or at private sale, as he may find most expedient, and if at public auction, after giving at least three weeks' previous notice by advertisement in some convenient newspaper of the time, place, and terms of sale, which terms shall be, one-third of the purchase-money to be paid in cash and the residue in two equal instalments at six and twelve months after date, with interest, to be secured by approved notes and a lien reserved, and on the ratification of such sale and full payment of the purchase-money he
24 shall convey the property sold to the purchaser, with all the title of the parties to this cause, and, as soon as convenient after any such sale, he shall make report of the same and of the fairness thereof to this court, under oath, and shall bring into court the proceeds of sale to abide the court's future order in the premises.

A. B. OLIN, *J.*

(Indorsed:) 1355, equity dock. 9. McBlair *v.* McBlair. Decree for sale and app. W. S. Cox receiver, etc. Eq. M. 4, p. 99. Filed May 10, 1869. R. J. Meigs, clerk.

25 *Bond of Trustee.*

Know all men by these presents that we, Walter S. Cox and William H. Philip, are held and firmly bound unto the United States in the penal sum of eight thousand dollars, to be paid to the said United States, their certain attorney or assigns; to which payment,

well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this tenth day of May, A. D. 1869.

Whereas by decree of the supreme court of the District of Columbia, made in the cause of Augusta McBlair *et al. vs.* John G. McBlair *et al.*, No. 1355, equity doc. 9, and dated May 10th, 1869, the above-bounden Walter S. Cox has been appointed trustee for the purposes therein mentioned:

Now, the condition of the above obligation is such that if the said Walter S. Cox shall well and truly perform the duties of him required by said decree and every future order and decree in said cause, then the said obligation shall be void; it shall otherwise remain in full force and virtue at law.

WALTER S. COX. [SEAL.]
WILLIAM H. PHILIP. [SEAL.]

Witness:
JOHN J. JOHNSON.

Approved May 14th, 1869.

GEO. P. FISHER.
Jus. S. C. D. C.

(Indorsed:) 1355, equity D. 9. McBlair *et al. vs.* McBlair *et al.* Trustee's bond. Filed May 14th, 1869. R. J. Meigs, clerk.

26 *Report of Trustee on Sale.*

Supreme Court of the District of Columbia.

McBLAIR *et al.*
v.
GADSBY *et al.* } Equity, 1355.

The undersigned, trustee in the above-entitled cause, respectfully reports that he has made sale of the lots of ground described in the bill, being lots fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one, and the north twenty-three feet five inches of lot thirteen, in square No. "seventy-eight," to J. H. McBlair for the sum of twenty-four thousand five hundred and twenty-one $\frac{50}{100}$ dollars; for which sum the said McBlair has passed to the undersigned his two promissory notes, each for twelve thousand two hundred and sixty $\frac{75}{100}$ dollars, payable, respectively, in three and six months after date, with interest.

WALTER S. COX, *Trustee.*

Sworn to this 13th day of June, 1872.

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Ass't Clerk.

(Indorsed:) 1355, eq. doc. 9. McBlair *vs.* Gadsby. Report of trustee on sale. Filed June 13, 1872. R. J. Meigs, clerk.

27 *Order Ratification Nisi.*

Supreme Court of the District of Columbia.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } 1355, Eq. Doc. 9.

The trustee in this cause having reported that he has sold lots Nos. 14, 15, 16, 17, 18, 19, 20, and 21 and the north 23 feet 5 inches of lot 13, in square No. 78, in the city of Washington, in the aforesaid District, to J. H. McBlair for $24,521.50, and that the purchaser has passed to him his two notes for the purchase-money, each for $12,260.75, payable, respectively, in 3 and 6 months after date, with interest—

It is by the court, this 13th day of June, 1872, ordered that the parties interested shew cause, on or before the 15th day of July next, why said sale should not be ratified and confirmed.

D. C. HUMPHREYS,
Justice D. C.

Indorsed: 1355. On motion calendar. McBlair *vs.* Gadsby. Order ratification *nisi*. M. 6, p. 402. Filed June 13, 1872. R. J. Meigs, clerk.

28 In the Supreme Court of the District of Columbia.

TUESDAY, *July 2nd*, 1872.

The court resumes its session pursuant to rules governing the same, Mr. Justice D. C. Humphreys presiding.

* * * * * * *

The court adjourns until to-morrow, 10 a. m.

Minutes Supreme Court of the District of Columbia, volume 6, folio 421.

* * * * * * *

Order Finally Ratifying Sale.

In the Supreme Court of the District of Columbia.

JULY 16, 1872.

The court resumes its session pursuant to adjournment, Justice Humphreys presiding.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } 1355, Equity Docket 9.

Ordered, this 16th day of July, A. D. 1872, that the sale hereinbefore reported of lots Nos. 14, 15, 16, 17, 18, 19, 20, and 21 and the north 23 feet 5 inches of lot No. 13, in square No. 78, in the city of

Washington, be, and the same is hereby, finally ratified and confirmed, no cause to the contrary thereof having been shown, as prescribed by the conditional order of ratification of said sale
29 passed in this cause on the 13th day of June, 1872.

* * * * * * *

The court adjourns until to-morrow at 10 a. m.

Minutes Supreme Court of the District of Columbia, volume 6, folio 448.

30 *Petition of the District of Columbia.*

In the Supreme Court of the District of Columbia, Holding an Equity Court in and for said District, at a Special *Time* thereof.

McBLAIR *et al.*
vs.
McBLAIR *et al.*
} Equity No. 1355.

To the supreme court of the District of Columbia, holding an equity court in and for said District:

1. The petitioner is a body corporate for municipal purposes under and by virtue of an act of Congress passed February 21, 1871.

2. On May 10th, 1869, this court passed a decree in the above-entitled cause directing Walter S. Cox, Esq., as trustee, to make sale of lots numbered 14, 15, 16, 17, 18, 19, 20, and 21 and part of lot numbered 13, in square number 78, in said District, and of other property indicated in the proceedings in said cause, the property which is particularly specified being that to which this petition relates. Reference is hereby made to said decree, which is prayed to be taken as part hereof.

3. On June 13, 1872, said Walter S. Cox, Esq, as trustee, filed a report in said cause setting forth that he had made sale of lots 14, 15, 16, 17, 18, 19, 20, and 21 and part of lot 13, in square No. 78, to John H. McBlair, a party defendant in said cause, for the sum of $24,521.50, for which said McBlair had passed to said trustee his two promissory notes, each for $12,265.75, payable, respectively,
31 in three and six months, with interest from their date. Reference is hereby made to said report, which is prayed to be taken as part of this petition.

4. On July 16th, 1872, said sale was, by decree of this court in the cause aforesaid, finally ratified and confirmed. Reference is hereby made to said decree of ratification, which is prayed to be taken as part thereof.

5. A deed has not yet been executed to said McBlair or to his petitioner, his grantee, as hereinafter stated, by said trustee.

6. Under and by virtue of an act of the Legislative Assembly of the District of Columbia, approved August 23rd, 1871, entitled "An act to provide for the purchase of certain market sites and the erec-

tion thereon of certain markets," Henry D. Cooke, then Governor of the District of Columbia, duly appointed and acting as such, purchased, on or about July 26, 1872, said lots, numbered 14, 15, 16, 17, 18, 19, 20, and 21, and part of lot 13, in square numbered 78. On or about July 26, 1872, said McBlair and Augusta McBlair, his wife, executed and delivered a deed in fee simple conveying said premises to the District of Columbia.

Said deed contains a covenant of general warranty on the part of John H. McBlair for himself, his heirs, and assigns, and estops him and them from controverting the title of said District in and to said premises.

A copy of said deed is hereto appended, marked "D. C. Exhibit No. 1," and prayed to be taken as part hereof. The consideration expressed in said deed is $26,521.50. Said consideration was paid in certain market stock bonds of the District of Columbia,
32 computed at ninety-seven cents on the dollar, and said bonds to the amount of $27,350 were delivered to said McBlair.

7. It was understood by said trustee that said McBlair was negotiating a sale of said premises to the government of the District of Columbia, and it was expected by him that if said sale should be effected he would assign his said purchase to said petitioner and the said purchase-money would be paid directly to said trustee.

8. The said McBlair made a sale of said premises to the petitioner and forthwith and long before receiving payment therefor entered into a contract for the repair of certain buildings in which the parties to said cause are interested, to be paid for out of the proceeds of said sale, and, upon receiving payment for said property from the petitioners, as hereinbefore stated, proceeded to expend the money upon said buildings. Said contract & payment having been made and said deed executed by McBlair to the petitioner without the knowledge or concurrence of said trustee regularly, said McBlair ought to have paid the amount of his notes to said trustee in order that the money should be disbursed under directions of the court, without which payment his title to said property did not become technically complete, and said trustee could not convey to him.

9. But the petitioner shows that the object of the bill in this cause was to have the proceeds of said property applied precisely as they were applied, to wit, to the improvement of the buildings aforesaid so as to increase the rental value thereof; and if the proceeds of said ground, to the amount of said McBlair's notes to said Cox,
33 trustee, were, in fact, applied to said object, as petitioner avers was the case, then, however irregular such proceeding, the said notes are virtually paid, and said trustee ought to execute a deed for said premises to the petitioner as assignee of said McBlair.

Said trustee cannot execute a deed with further order of the court, because said McBlair has not complied with the terms of the sale to him by paying the purchase-money to said trustee.

Wherefore your petitioner prays that an account may be taken of the expenditures from the proceeds of the bonds aforesaid upon said buildings; that your honors will decree that said notes of McBlair to said trustee be cancelled as paid, and said trustee be directed to

convey said premises to the petitioner, and that such other relief be afforded to the petitioner as the nature of the case may require.

ALEXANDER R. SHEPHERD,
Governor D. C.

EDWIN L. STANTON,
Of Counsel for the District of Columbia.

I, Alexander R. Shepherd, on oath, say that I am the Governor of the District of Columbia; that I have read the foregoing petition of said District by me as such Governor subscribed; that I know the contents thereof, and that the matters therein stated as of the knowledge of said District I know to be true, and those stated on information and belief I believe to be true.

ALEX. R. SHEPHERD.

Sworn to and subscribed before me, a justice of the peace
34 in and for the District of Columbia, this 4th day of June, 1874.

WM. TINDALL, *J. P.*

(Indorsed:) In equity. No. 1355, eq. doc. 9. McBlair *et al. vs.* Gadsby *et al.* Petition of District of Columbia for account and conveyance of premises. Filed June 15, 1874. R. J. Meigs.

35 SECRETARY'S OFFICE, DISTRICT OF COLUMBIA.

To all to whom these presents shall come, Greeting:

I certify that hereto annexed is a true copy of a deed executed between John H. McBlair and the District of Columbia, and dated the twenty-sixth day of July, A. D. 1872.

Original deed on file in this office.

In testimony whereof I, Richard Harrington, secretary of the District of Columbia, have hereunto subscribed my name and caused the seal of the District of Columbia to be affixed.

Done at the city of Washington, District of Columbia, this — day of ——, 1871.

[SEAL.] RICHARD HARRINGTON.

36 This indenture, made the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and seventy-two, between John H. McBlair, of the city of Washington, in the District of Columbia, and Augusta McBlair, his wife, parties of the first part, and the District of Columbia, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of twenty-six thousand five hundred and twenty-one dollars and fifty cents in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said party of the second part, its

successors and assigns, forever all those pieces or parcels of ground lying and being in the city and District aforesaid and known as lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), and the north twenty-three (23) feet five (5) inches by the depth of lot numbered thirteen (13), in square numbered seventy-eight (78), being the same real estate which was sold by one Walter S. Cox, trustee, to the said John H. McBlair by virtue of a decree made by the supreme court of the District of Columbia, made in the cause of McBlair *et al. vs.* McBlair *et al.*, No. 1355, equity doc. 9, and dated May tenth (10), A. D. 1869, together with all the improvements, ways,
easements, rights, privileges, and appurtenances to the same
37 belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, and claim and demand whatsoever, whether at law or in equity, of the said parties of the first part of, in, to, or out of the said pieces or parcels of land and premises; to have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their sole use, benefit, and behoof forever.

And the said John H. McBlair, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said party of the second part, its successors and assigns, that the said parcels of land and appurtenances are free and clear of all incumbrances whatever, and that the said John H. McBlair and his heirs shall and will warrant and forever defend the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, from and against him, the said John H. McBlair, and his heirs, and against all and every other person and persons whomsoever lawfully claiming or to claim the same or any part or parcel thereof shall and will warrant and forever defend by these presents.

And, further, that the said John H. McBlair and his heirs shall and will at any and all times hereafter, upon the request and at the cost of the said party of the second part, its successors and assigns, make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances unto the said party of the second part, its successors or assigns, or — its or their counsel learned in the law shall advise, devise, or require.

38 In testimony whereof the said parties of the first part have hereto set their hands and seals on the day and year first hereinbefore written.

(Signed) JOHN H. McBLAIR.
(Signed) AUGUSTA McBLAIR.

Signed, sealed, and delivered in presence of (having first been duly stamped)—

(Signed) D. W. ANDERSON.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

I, D. W. Anderson, a justice of the peace in and for the District aforesaid, do hereby certify that John H. McBlair and Augusta McBlair, his wife, parties to a certain deed bearing date on the twenty-sixth day of July, A. D. 1872, and hereto they personally appeared before me, in the District aforesaid, the said John H. McBlair being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed, and the said Augusta McBlair, being by me examined privately and apart from her said husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same and that she wished not to retract it.

Given under my hand and seal this 26th day of July, A. D. 1872.

(Signed) D. W. ANDERSON,
Justice of the Peace.

(Indorsed:) Deed. John H. McBlair *et al.* to District of Columbia. 2 p. m., received per record, August 1, 1872, and recorded in Liber No. 674, folio 14, one of land records for the District of Columbia, & ex'd by S. Wolf, recorder.

(Indorsed:) In equity. No. 1355, doc. 9. McBlair *et al. v.* Gadsby *et al.* Exhibit to petition of District of Columbia. Filed June 15, 1874. R. J. Meigs.

39 *Order of Reference to Auditor to Report, &c.*

In the Supreme Court of the District of Columbia, Holding an Equity Court in and for said District, at a Special Term thereof.

MCBLAIR *et al.* } Equity No. 1355.
vs.
GADSBY *et al.* }

Upon the filing of the petition of the District of Columbia for an account of expenditures from the proceeds of bonds in said petition mentioned for cancellation of the promissory notes made by John H. McBlair and in said petition described, and for a conveyance to said petitioner, and upon motion of counsel for said petitioner, it is thereupon, this 15th day of June, 1874, ordered that the above-entitled cause be, and hereby is, referred to the auditor to state an account in respect to the expenditures from the proceeds of the bonds in said petition mentioned.

By the court: A. W.

(Endorsed:) 1355, eq. McBlair *et al. vs.* Gadsby *et al.* Order. Reference to auditor to report an account. Filed June 15th, 1874. R. J. Meigs.

40 *Stipulation of Counsel for Enlargement of Reference to Auditor.*

In the Supreme Court of the District of Columbia. In Equity.

McBLAIR *et al.*
v.
GADSBY *et al.*
No. 1355.

It is agreed that the order heretofore passed in this cause upon the filing of the petition of the District of Columbia referring the cause to the auditor for statement of an account in respect of the proceeds of certain bonds may be so modified as to require the auditor also to report his conclusions in respect of the subject-matter of said petition upon the evidence heretofore taken under the pending reference of the cause.

R. B. WARDEN,
Att'y for McBlair.
E. L. STANTON,
Att'y for D. C.

(Indorsed:) In eq. No. 1355. McBlair *vs.* Gadsby. Stipulation of counsel for enlargement of reference to auditor. Filed Apr. 22d, 1875. R. J. Meigs.

41 *Order Enlarging Reference to Auditor.*

In the Supreme Court of the District of Columbia, Sitting in Equity.

AUGUSTA McBLAIR
vs.
JOHN G. McBLAIR *et al.*
No. 1355, Doc. 9.

By consent of counsel it is, this 22nd day of April, 1875, ordered that the order heretofore passed in this cause upon the filing of the petition of the District of Columbia referring the cause to the auditor for a statement of an account in respect of the proceeds of certain bonds be, and the same is hereby, modified so as to require the auditor also to report his conclusions in respect of the subject-matter of said petition upon the evidence heretofore taken under the pending reference of the cause.

By the court: A. W.

(Indorsed:) In eq. 1355. McBlair *vs.* Gadsby. Order enlarging reference to auditor. M. 9, p. 170. Filed Apr. 22, 1875. R. J. Meigs.

42 *Order Requiring Auditor to Report at Once.*

In the Supreme Court of the District of Columbia, Sitting in Equity.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR, GADSBY, *et al.* } No. 1355.

Upon the motion of E. L. Stanton, solicitor for petitioner, the District of Columbia, it is, this 29th day of June, 1875, ordered that the orders heretofore passed in this cause upon the petition of the said District be, and the same are hereby, modified so as to require the auditor to report at once his conclusions, together with the testimony upon the subject-matter of said petition.

By the court: A. W.

(Indorsed:) In equity. No. 1355, doc. 9. McBlair *et al. vs.* Gadsby *et al.* Order modifying reference to auditor. M. 9, p. 259. Filed June 29, 1875. R. J. Meigs.

43 *Report of Auditor on Prayer of Petitioner, the District of Columbia.*

In the Supreme Court of the District of Columbia. In Equity.

MCBLAIR
vs.
GADSBY. } No. 1355, Doc. 9.

On the 15th day of June, 1874, this cause was, by order of this honorable court, "referred to the auditor to state an account in respect of the expenditures from the proceeds of the bonds in said petition mentioned."

Under this order of reference the witnesses, J. H. McBlair, C. R. McBlair, W. W. Warden, and J. C. Harkness, testified before the Honorable R. Leech, deceased, late auditor. Before the testimony was furnished in manuscript by the short-hand reporter who took it Judge Leech died.

On the 22nd day of April, 1875, the foregoing order of reference was, by the court, "modified so as to require the auditor also to report his conclusions in respect of the subject-matter of said petition upon the evidence heretofore taken under the pending order of reference."

On the 29th day of June, 1875, it was, by the court, "ordered that the orders heretofore passed in this cause upon the petition of the said District be, and the same are hereby, modified so as to require the auditor to report at once his conclusions, together with the testimony, upon the subject-matter of said petition."

Therefore I, Thomas Hood, the said auditor, in pursuance
44 of said orders of reference, respectfully report that I caused the witnesses mentioned to subscribe and make oath, respect-

48 take them at 97 cents—guaranteed at 97 cents. Upon that obligation I went to the bank and borrowed money, and the bonds were delivered to me on the 14th day of October, 1872, and when the Governor delivered them to me he told me he would put the balance of the bonds on the market in a fortnight and he would include these bonds in the sale; that the four million bonds had never been put on the market until to-day; consequently they have no market value. That is the way I took them at 97. Of course, it being a cash transaction, I had judgment enough not to take the bonds at less than their cash value.

"The bonds that were transferred to me amounted to twenty-seven thousand and something, guaranteed at 97 cents on the dollar. I have no doubt that the amount impressed on their face was $27,350."

Nearly all of this testimony was objected to by Mr. Stanton.

The bonds referred to were market stock bonds of the District of Columbia.

McBlair further states that he got a decree passed, after an interview with the heirs, authorizing the sale of the property, and that he had been trying to effect a sale to the District for two or three years, and that he bought the property for a certain price and sold it at a little advance and that surplus was to come to him, McBlair. McBlair also says in substance, in his testimony of Oct. 26, 1874, that the bonds that he received were to represent $26,521.50, calculating the bonds at 97 cents, and that the exact amount

49 originally obtained by him upon pledged bonds was $22.700.

The testimony of McBlair, taken February 22, 1875, pages 18, 19, and 20, shows that the sale was for cash and that the bonds were received at the assumed and assured value of 97 cents on the dollar.

All of the testimony touching that point indicates that, although no details as to the consequences of a failure of the bonds to produce the sum of 97 cents were mentioned, yet that McBlair received from Governor Cooke the assurances as sworn to; that McBlair accepted these assurances and relied upon them, and that without them the sale would not have been agreed upon.

The testimony of Col. W. W. Warden shows that Warden, being about to go to New York and having been requested by McBlair to sell some of these bonds there, called on Governor Cooke to consult with him on the subject. The Governor advised Col. Warden not to attempt to do anything with the bonds then, and said they could not be sold for anything; that they had no market value then; that he had intended to put them on the market before, but was waiting for some additional legislation which would establish a value for them.

Touching the Governor's understanding of the conditions of the purchase from McBlair, Col. Warden testifies in these words:

"He (the Governor) informed me that he agreed with Major McBlair and, I think, somebody else—I don't know who—to purchase the market-house property at a cash value. I told him that Major McBlair informed me that when he took those bonds he took

50 them at 97 cents on the dollar on the assurance of Governor

Cooke that by his handling of them, as he proposed, he was going to make them worth that figure. I related to him (the Governor) what Major McBlair had told me as to the arrangement that he had made (with the Governor on receiving the bonds). The Major's statement was that he had made the original agreement on a cash basis, and that from the suggestion of Governor Cooke that these bonds would be made worth 97 cents by reason of his handling of them on the market he, Major McBlair, took the bonds at 97 cents on the dollar. He, Governor Cooke, assented to the correctness of this statement; said he was going to put them on the market, and had intended to do so at 97 cents," &c.

Major McBlair, in his testimony, claims to have been injured by the negligence and delay of the petitioner in deciding upon the sufficiency of the title to the lots, but as I do not believe that subject to be submitted to me I will not report upon that point.

I am clearly convinced that Governor Cooke undertook by his handling of these bonds to make them worth 97 cents on the dollar, and that he has failed to accomplish this.

Mention is made in the testimony of C. R. McBlair of the sale of some of them by Middleton at 70 cents, and Major McBlair testifies that the whole amount realized by pledging them was $22,700, and it appears that in one instance, at least, they were pledged for more than they could be sold for.

So I think I may safely conclude that these bonds have not been, at any time, worth 97 cents on the dollar, and that therefore
51 the full amount of the purchase price has not been paid by the petitioner.

The facts referred to do not appear to be especially resisted by the petitioner, but the point most particularly relied upon is the proposition that it was not competent for Governor Cooke to bind the government of the District in the manner claimed by McBlair. I will briefly examine the question.

The government of the District has by its petition accepted McBlair as a vendor and Governor Cooke as a vendee on behalf of the petitioner, for it seeks to enforce a conveyance according to its understanding of the legal effect of the contract between McBlair and the Governor, acting as the agent of the petitioner, the character and extent of which agency I will hereafter refer to.

In the brief of the solicitor for the government of the District, page 9, this doctrine is amended: "The authority to bind the principal by a guaranty of such present or prospective value as the agent may see fit to fix." This may be a sound proposition as applicable to cases in which the power to sell only in and to the general extent of that power is delegated to the agent; of that, however, I am not without a doubt; but in this case the duties and powers of a governor considerably exceed such as are covered by the proposition.

By section 1 of the act of Legislative Assembly approved August 23, 1871, referred to in Mr. Stanton's brief, the Governor is charged with the duty of approving the selection of the sites for the market-houses; and he has also the power to "purchase the same

52 on the most reasonable terms and to have erected thereon, under the superintendence of the Board of Public Works, market-houses of the most approved style of construction and appearance and suitable in size to the location where erected." This language of that act gives the Governor a general plenary supervision of the enterprise, drawing upon and trusting to not only his financial judgment and wisdom, but his accomplishments in matters of architectural æsthetics.

By section 2 of that act the Governor is "authorized and empowered, on behalf of the District of Columbia, to issue or cause to be issued registered or coupon bonds, designated on the face 'market stock,' to an amount not exceeding three hundred thousand dollars, in suitable denominations, payable twenty years from the date of their issue," &c.

By section 3 of the act it is provided that when the bonds are prepared for issue they shall be sold by the Governor, who shall deposit the proceeds thereof, &c.

In conferring power to sell the act referred to imposes no restriction as to price or place or manner of sale. These important incidents of the sale are left to the discretion of the Governor. Directions are given as to depositing the proceeds of the sale of the bonds, but consistent with the power and discretion generally given the Governor, without prescribing any sum to be realized from the sale of the whole or any part of the said three-hundred-thousand-dollar issue. The power to dispose of the bonds in any amounts and at any sum or price which the Governor might regard as most
53–107 judicious and best seems unquestionable. It appears that the Legislative Assembly designed to and did vest the Governor with all the power necessary for the accomplishment of the project of purchasing grounds and erecting market-houses upon the security of the credit of the District of Columbia, and that such credit was to be used to such extent and in such manner as in the wisdom and discretion of the Governor should appear necessary and proper to effectuate the ends contemplated.

Had Governor Cooke been the sole owner of the bonds in question, and had the transaction been his individual enterprise, he could hardly have acted more independently of accountability to a principal authority than he had a lawful right to act and did act.

A careful examination of the law and the evidence submitted leads me to the conclusions that I have expressed, and I therefore respectfully report—

That the purchase price agreed upon for the lots mentioned in the petition is $26,521.50.

That the government of the District of Columbia, by Governor Henry D. Cooke, its lawfully constituted agent for that purpose, agreed to pay to J. H. McBlair that sum for said lots.

That said government has not paid that sum in full, and that the prayer of the petition asking for a decree directing the trustee to

convey said premises to the petitioner ought to be denied, and I therefore respectfully recommend accordingly.

All of which is respectfully submitted.

July 26, 1875.

THOMAS HOOD, *Auditor.*

* * * * * * *

108 *Order for Conveyance from Trustee to District of Columbia.*

In the Supreme Court of the District of Columbia, Sitting in Equity.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR, GADSBY, *et al.* } No. —.

This cause coming on to be heard upon the pleadings and proceedings heretofore had, and especially upon the petition filed in behalf of the District of Columbia on June 15th, 1874, and the report of the auditor thereon, filed July 27th, 1875, and the exceptions filed on behalf of said District to said auditor's report, and the matter having been argued by counsel and considered by the court, it is thereupon, this 7th day of August, 1875, adjudged, ordered, and decreed that said exceptions to said auditor's report be, and they are hereby, sustained.

And it is further ordered that the prayer of said petition be, and the same is hereby, granted, and Walter S. Cox, heretofore appointed trustee in this cause, is directed to execute and deliver a conveyance of the premises in said petition mentioned to the District of Columbia, and to surrender the notes of J. H. McBlair in said petition mentioned to said McBlair as though they had been paid.

And it is further ordered that the amount of the bond to be given in the event of an appeal being taken to the general term from this order be, and the same is hereby, fixed at one hundred dollars.

By the court:

A. W.

(Indorsed:) In equity. 1355, doc. 9. McBlair *et al. vs.* Gadsby *et al.* Order for conveyance from Walter S. Cox, trustee, to Dist. Col. M. 10, p. 9. Filed Aug. 7, 1875. R. C. Meigs.

109 *Appeal of J. H. McBlair.*

In the Supreme Court of the District of Columbia. In Equity.

MCBLAIR *et al.*
v.
GADSBY *et al.* } No. —.

The defendant, J. H. McBlair, appeals from the order entered in this cause under date of August 7th, 1875.

R. B. WARDEN,
Solicitor for J. H. McBlair.

(Indorsed:) Equity No. 1355, doc. 9. McBlair *et al. vs.* Gadsby *et al.* Appeal of defendant, J. H. McBlair, from order. Filed August 7, 1875. R. J. Meigs.

109½ Proceedings before the supreme court of the District of Columbia sitting in general term, commencing Monday, January —, 1876.

In the Supreme Court of the District of Columbia.

JANUARY 3RD, 1876.

Present: Chief Justice Cartter and Justices Olin, Wylie, and MacArthur.

* * * * * * *

Adjourned until the 3rd Monday, 17th of January, 1876.

D. K. CARTTER,
Chief Justice.

Minutes of Supreme Court of the District of Columbia, volume 2, p. 494.

110 *Decree of General Term Reversing Decree of Special Term and Remanding Case.*

* * * * * * *

In the Supreme Court of the District of Columbia. In Equity.

SATURDAY, *March 4th*, 1876.

Session resumed pursuant to adjournment.

Present: Justice Olin, presiding, and Justices Wylie, Humpherys, and MacArthur.

* * * * * * *

AUGUSTA MCBLAIR, Wife of J. H. McBlair, and JULIA Ten Eyck, Wife of John C. Ten Eyck, by Her Next Friend, William H. Philip,
vs.
MCBLAIR, GADSBY, and Others, Defendants. } No. 1355.

This cause coming on to be heard on the 4th day of February, 1876, upon the appeal to this court, by John H. McBlair, from the decree of the special term of the 7th of August, 1875, *and* was *agreed* by counsel; and thereupon, on consideration thereof, it is, this 4th day of March, 1876, ordered, adjudged, and decreed by this court that the said decree of the special term be, and the same is hereby, reversed with the costs, and further orders that the cause be remanded to the special term to be further proceeded with as the parties may be advised—Addendum: May 9, 1876. By leave of court. Present: ch'f just. and Justices Wylie and MacArthur—(and without preju-

dice on the right of the defendant, The District of Columbia, to proceed in this or any other suit as it may be advised or is entitled to).

* * * * * * *

Minutes of the Supreme Court of the District of Columbia, volume 2, folio 528.

111 *Petition of Williams and Gallant.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

JULIA TEN EYCK *et al.* *vs.* JOHN H. MCBLAIR *et al.* } No. 1355 & No. 2368.

To the honorable the justices of the supreme court of the District of Columbia, holding an equity court:

Your petitioners, Thomas Williams and William G. Gallant, of the city of Washington, in the District of Columbia, lately trading under the name and firm of Williams & Gallant, to the use of Joseph Libby and John E. Libby, trading under the name and firm of Jos. & J. E. Libby, and also to the use of Jacob H. Kengla, most respectfully show unto your honors as follows:

1st. That Augusta McBlair, wife of John H. McBlair, and Julia Ten Eyck, wife of John C. Ten Eyck, by *his* next friend, William H. Philip, on or about the 30th day of July, 1868, filed their bill of complaint in your honorable court against John G. McBlair, Virginia McBlair, Augusta Ten Eyck, and others, setting forth that John Gadsby, their father, departed this life in or about the year 1844, after having made and published his last will and testament, whereby he devised to trustees, to wit, Provy Gadsby, his wife, and others, certain real estate in trust, to wit, lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, & 19, in square 78, for the separate use and enjoyment, in equal moieties, by said Augusta McBlair and Julia Ten Eyck, for life, respect*fully*, as will more fully appear, refer-
112 ence being had and is hereby made to said bill of complaint, being equity cause No. 1355, which your complainants pray leave to read and make part hereof if need be.

2. Your petitioners further show that said lots 8, 9, and 10 in said bill mentioned front on I street north and were improved by substantial row of dwellings, six (6) in number, and the other lots were vacant and unimproved, except partially occupied by outbuildings, and that said dwelling-houses were of great value, but were very much out of repair, old-fashioned, and unimproved with modern improvements; and, further, that said Augusta McBlair and Julia Ten Eyck, by their said bill of complaint, claimed if the same were properly improved and modernized the same would yield a good income for their benefit, and prayed that your honorable court would order a sale of the said vacant lots and the proceeds of such sale be applied to the improvement of said old dwelling-houses, as the said

Augusta McBlair and Julia Ten Eyck had not the means to make such improvements, as the income of said property was wholly inadequate for their support.

3. The petitioners further show they are informed and believe, and so believing say, that your honorable court, upon the auditor's report in said cause (as to the propriety of sale for said purpose in said bill mentioned), ordered a sale of said vacant lots, and Walter S. Cox, Esq., was appointed trustee to make sale, who sold the same to John H. McBlair for the sum of $24,521, and the said sale was ratified and confirmed.

113 4. Your petitioners further show that on or about the 26th day of April, 1871, the said Julia Ten Eyck, Augusta M. Ten Eyck, and others filed their bill of complaint in your honorable court against said Augusta McBlair, John H. McBlair, and others, praying for the appointment of a new trustee or trustees in the place of Provy Gadsby and others in said cause mentioned, as will appear by reference to said last-mentioned bill of complaint, being filed and known as equity cause 2368, which your petitioners pray leave to make part hereof if need be.

5. Your petitioners further show that on or about the 4th day of May, 1872, your honorable court appointed John C. Harkness, Esq., trustee in place of the deceased trustees in said will of said John Gadsby mentioned.

6. Your petitioners further show that afterwards, to wit, on or about the 29th day of July, A. D. 1872, your petitioners entered into a written contract with said John H. McBlair, agent and attorney for the estate of said John Gadsby, deceased, that your petitioners would, in a good, substantial, and workmanlike manner, and — their own proper cost or charge and expense, well and truly execute, set up, and completely finish or cause to be done, — all labor and find all materials of whatsoever kind required to erect four (4) back buildings and remodel main buildings located in said square No. 78, at the northeast corner of 21st street and I street, according to the plans and specifications furnished by Thomas M. Plowman, Esq., architect, and under his directions and explanations, all to be done by your said petitioners at and for the sum of $18,000; and it

114 was further understood and agreed that all extra work and alterations or additions should be paid for at fair rates, as will fully and more particularly appear, reference being had and is hereby made to said contract and specifications herewith filed as part hereof and marked W. — G. Nos. 1 & 2.

7. Your petitioners further show that, in accordance with said contract and specifications, your petitioners commenced work on said buildings and completed the same to the satisfaction of said Thomas M. Plowman, architect and superintendent of the said buildings; and, further, that your petitioners did extra work and labor on said buildings amounting to the sum of $1,504.20, as will appear by Exhibit W. — G. No. 3, herewith filed as part hereof.

8. Your petitioners further show that they have been paid on account of said contract price the sum of $17,205, leaving a balance due and payable to your petitioners on said contract and extra work

the sum of $2,299.20, with interest from the 30th day of April, A. D. 1873, as will appear by Exhibit W. & G. No. 4, as part hereof.

9. Your petitioners further show that said Augusta McBlair, Julia Ten Eyck, and other parties to said equity cause, together with said John C. Harkness, Esq., trustee, appointed as aforesaid, well knew that your petitioners were doing said work on said dwelling-houses and no objection was made thereto, and also knew that your petitioners have endeavored to get payment for the same, but have wholly failed to do so owing to the fact, as alleged, there was and is no money with which to pay said debt except through the order of your honorable court.

115 10. Your petitioners further show that said contract price and extra work, as your petitioners are informed and believe, and so believing say, was to be paid for out of the proceeds of sale of said vacant lots.

12. Your petitioners further show they are informed and believe that after the appointment of said John C. Harkness, Esq., as trustee the said Walter S. Cox, Esq., trustee aforesaid, duly accounted to and paid over to said John C. Harkness, Esq., the balance of the proceeds of sale.

Your petitioners therefore pray as follows:

1st. That your honorable court will grant unto your petitioners rule against said Julia Ten Eyck, Abram B. Cox, Jr., Julia Cox, Julia G. Willhouse (formerly Ten Eyck), Jane Sanders, May Ten Eyck, John C. Ten Eyck, Jr., Augusta McBlair, John H. McBlair, Jr., John G. McBlair, Virginia Smith, Julia McBlair, C. Ridgely McBlair, A. Jackson McBlair, William N. Gadsby, Sally N. Gadsby, J. Eiken Gadsby, Albert Newton, Marrie McCommick, Margaret Wallach, Margaret Chapman, John H. McBlair, John C. Harkness to show cause, if any they have, why your petitioners should not be paid the said sum of $2,299.20, with interest from the 30th day of April, A. D. 1873, by said John C. Harkness, Esq., trustee, out of the moneys or bonds in his hands as trustee of said estate or out of the rents of said property.

2d. That said John C. Harkness, Esq., trustee, be, by an order of your honorable court, *be* directed to pay to your petitioners the said sum of $2,299.20, with interest from the 30 April, 1873.

3rd. Your petitioners may have such other and further
116–142 relief as this cause may require.

THOS. WILLIAMS.
WILLIAM G. GALLANT.

I, Thomas Williams, do solemnly swear that I have heard read the foregoing petition signed by me, and that the facts therein stated upon my own personal knowledge are true, and those facts therein stated upon information and belief I believe the same to be true.

THOMAS WILLIAMS.

Subscribed & sworn to before me this 14th day of July, A. D. 1876.

THOS. J. MYERS,
Notary Public.

(Indorsed:) 1355, equity. Augusta McBlair *et al. vs.* John G. McBlair *et al.* The clerk will please file the petition of Thomas Williams & William G. Gallant to the use of Joseph & J. E. Libby and Jacob H. Kengla, & Exhibits W. & G. Nos. 1, 2, 3, and 4, and issue as within. Merrick & Morris, Wm. J. Miller, sol's for petitioners. Filed July 14, 1876. R. J. Meigs, clerk.

* * * * * * *

143 *Rule to Show Cause and Return of Service thereof.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

AUGUSTA MCBLAIR *et al.* *vs.* JOHN G. MCBLAIR *et al.* } No. 1355, Equity — No. 9.

On Tuesday, the fifth day of September, A. D. 1876, a motion by Thomas Williams and William G. Gallant, petitioners in the above-entitled cause, for rule on Julia Ten Eyck, Abram B. Cox, Jr., Julia Cox, Julia G Hillhouse, Jane Sanders, May Ten Eyck, John C. Ten Eyck, Jr., Augusta McBlair, John H. McBlair, Jr., Julia T. McBlair, Virginia Smith, C. Ridgely McBlair, A. Jackson McBlair, William N. Gadsby, Sallie N. Gadsby, J. Eakin Gadsby, Mary Gadsby, Albert Newton, Marrie McCommick, Margaret Wallack, Margaret Chapman, John H. McBlair, and John C. Harkness to show cause, if any they have, why said petitioners should not be paid the balance due them for work, labor, and materials in said petition mentioned, and also why said John C. Harkness, as trustee, should not be directed to pay said petitioners or their assignees the amount claimed in said petition, with interest.

And it is further ordered that a copy of this order be served on such of the above-named persons who are not — by and through the United States mails.

By the court: —— ——.

I do hereby certify that on this 27th day of July, 1876, — served such copies of the *written* order to the following-named per-
144 sons *to* their post-office address, as furnished me by Wm. J. Miller, attorney of record, by and through the United States mail, being Albert Newton, Maria McCommick, Margaret Chapman, Margaret Wallack, Julia Cox, A. B. Cox, Jr., Julia G. Hillhouse. Julia Ten Eyck, Mary Ten Eyck, May Ten Eyck, John C. Ten Eyck, James Sneider.

ALEX. SHARP,
Marshal D. C.

(Indorsed:) 1355, equity. McBlair *et al. v.* McBlair *et al.* Rule to show cause, &c. M. 11, p. 78. Paid, $12. Served copy of rule to show cause on Augusta, John, Julian T., C. Ridgely, A. Jackson, and John H. McBlair, Wm. N., Sallie, Ann, J. Eaton, & Mary

Gadsby, Virginia Smith, J. C. Harkness; not to be found the others. Alex. Sharp, marshal. July 24th, 1876. Filed July 18, 1876. R. J. Meigs, clerk.

145 *Separate Answer of John T. Harkness to Petition of Williams and Gallant.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

JULIA TEN EYCK *et al.* *vs.* J. H. MCBLAIR *et al.* } No. 1355 and No. 2368.

The separate answer of John C. Harkness, trustee, of the city of Washington and District of Columbia, one of the defendants, to the petition of Thomas Williams and William G. Gallant, of the city of Washington and District of Columbia, lately trading under the name and firm of Williams and Gallant, to the use of Joseph Libby and John E. Libby, trading under the name and firm of Joseph and J. E. Libby, and also to the use of Jacob H. Kengla, petitioners.

To the honorable the justices of the supreme court of the District of Columbia, holding an equity court for the said District:

The defendant, reserving to himself all right of exception to the said petition, for answer thereto, saith:

1. He admits the allegation of the first (1) paragraph of the petition.

2. He admits the allegation of the second (2) paragraph of the petition.

3. He admits the allegation contained in the third (3) paragraph of the petition.

4. He admits the allegation contained in the fourth (4) paragraph of the petition.

146 5. He admits that on or about the 4th day of May, A. D. 1872, he may have been appointed by your honorable court trustee in place of the deceased trustee mentioned in the will of John Gadsby, but he would further state that he did not enter upon the duties of that office until the 23d day of September, A. D. 1872, at which time the contract between the defendant, J. H. McBlair, and the petitioners had been made and the improvements which the said concract contemplated had been under way more than a month and a half and were already far advanced.

6. He admits that on or about the 29th day of July, A. D. 1872, the petitioners may have entered into a contract with J. H. McBlair, Esq., and that the terms and consideration of the said contract may have been as stated in the 6th paragraph of the petition.

But he would further state that neither J. H. McBlair nor any other person had any authority from your honorable court (as was

necessary) to enter into a contract for the improvement of the said buildings, as will plainly appear by reference to the decree of your honorable court dated the 10th May, 1869, in equity cause numbered 1355.

7. He is unable to determine whether the alleged extra work is really extra or not, as the petitioners have failed to file with their petition the plans of the said improvements, which plans were made a part of the said contract, and without which plans the specifications are vague and indefinite, and in the absence of said plans it would be difficult to determine whether the charges made for the alleged extras are reasonable and just.

And, in further answer to the 7th paragraph of the petition,
147 the defendant says that the contract with J. H. McBlair provided that in case of departure from the original designs and specifications any disagreement as to price for extra work occasioned thereby should be settled by reference, whose decision should be final and binding on both parties, which provision has been disregarded by petitioners in coming into court instead of referring as provided by the contract.

And the defendant would make the further answer to the 7th paragraph of the petition that the improvements contracted for were never, in his judgment, finished, and that much of the work which was done was not done to the satisfaction of the owners, as the contract provided it should be.

8. In reference to the sums admitted by petitioners to have been paid and the balance claimed to be due and payable to them he says he knows nothing, except that while it appears the contract price and the amount claimed for extras aggregate the sum of $19,504.20, the Gadsby estate, by some to him unexplained means, is already out on that account not far from $26,000.

9. He denies that his consent to and approval of the so-called improvements can be inferred from his not having heretofore made objection thereto, inasmuch as it did not become him to interfere in a transaction which, had the court authorized it, would have pertained to the special trusteeship of Walter S. Cox, Esq., and the contract relating to which had been concluded months prior to his qualification as trustee.

148 And, in further answer to the 9th paragraph of the petition, he admits that there are no funds in his possession applicable to the payment of the amount claimed by petitioners.

10. He denies that the work and labor upon said houses have enhanced their value to the amount of $28,000, and that the increase of rent has been in proportion thereto; and, in further answer to the 10th paragraph of the petition, he would say that the corner house has rented and still rents for the same amount as prior to the improvements; that the 2nd house remained idle for seven months and then rented at a sum per annum considerably below other houses of the same size and advantage of location; that the 4th house remained vacant 18 months and then rented at a very low figure compared with other houses of the same description and advantage of location.

11. He denies that any authority has ever been given by this honorable court to expend the proceeds of the sale of the said vacant lots; and, in further answer, would say that the decree appointing Walter S. Cox, Esq., trustee required him to bring the proceeds of sale into court, subject to its future order, which duty, to the great detriment of the estate, has never been performed.

12. He denies most emphatically that Walter S. Cox, Esq., or any other person has ever accounted to him or paid over to him any of the proceeds, great or small, of said sale of vacant lots.

In consideration of the foregoing answers the defendant prays that the petition be dismissed without costs to defendant.

JOHN C. HARKNESS, *Trustee.*

149–152 R. H. HARKNESS,
Solicitor for Defendant Harkness.

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

JOHN C. HARKNESS, *Trustee.*

Subscribed and sworn before me, a notary public in and for the District of Columbia, county of Washington, this fifth day of September, A. D. 1876.

E. K. WILSON,
Notary Public.

(Indorsed:) Equity, 1355. Julia Ten Eyck *et al. vs.* J. H. McBlair *et al.* Separate answer of John C. Harkness to petition of Williams & Gallant. Filed July 14, 1876. R. H. Harkness, solicitor for def't Harkness. Filed Sep. 5, 1876. R. J. Meigs, clerk.

* * * * * * *

153 *Order Referring Petition of Williams & Gallant to Auditor.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

AUGUSTA MCBLAIR
vs.
JOHN G. MCBLAIR. } No. 1335, Docket 9.

On motion of petitioners in above-entitled cause it is ordered, this 24 day of October, A. D. 1876, that said petition, exhibits, and answers be, and the same are hereby, referred to the auditor of the court to take proof as to said matter in said petition alleged, and also to state an account of what is due to said petitioners for work and labor done and provided in and about the remodeling of the houses in said petition and exhibits mentioned, and report the same to the court.

A. B. OLIN.

We consent to the above.

MERRICK, MORRIS & MILLER,
Sol's for Petitioners.

R. H. HARKNESS,
Sol. for J. C. Harkness.

(Indorsed:) 1355, equity doc. 9. McBlair *vs.* McBlair *et al.* Order referring petition of Williams & Gallant, &c., to auditor to take proof and state account, &c. M. 11, p. 218. Filed Oct. 24, 1876. R. J. Meigs, clerk.

154 *Report of Auditor on Petition of Williams and Gallant.*

In the Supreme Court of the District of Columbia. In Equity.

AUGUSTIA MCBLAIR
vs.
JOHN G. MCBLAIR. } No. 1355, Docket 9.

On the 24th day of Oct., 1876, this honorable court passed the following order:

"That said petition, exhibits, and answers be, and the same *is* hereby, referred to the auditor of the court to take proof as to said matter in said petition alleged, and also to state an account — what is due to said petitioners for work and labor done and provided in and about the remodeling of the houses in said petition and exhibits mentioned, and report the same to the court."

Therefore, in pursuance of the above reference, I, Thomas Hood, the said auditor, did, on the 30th day of October, 1876; the 2d, 3d, 11th, 14th, 15th, 17th, 22nd, 27th, and 30th days of November; the 1st, 2nd, 7th, 9th, 12th, 13th, 15th, and 19th days of December, and the 2nd, 18th, 22nd, 25th, and 29th days of January, 1877, take the testimony of all the witnesses produced before me in this cause, and have appended the same to this report, reference to which is made.

Messrs. Williams & Gallant, by their petition filed herein on the 14th day of July, 1876, claim a balance due them for labor and material furnished under a certain contract in writing with Jno. H. McBlair, as agent and attorney for the estate of Jno. Gadsby, deceased.

155–180 The original amended answers of Jno. C. Harkness, trustee, while admitting the making of said contract, deny the authority of John H. McBlair to make the same, and thereby bind the estate of said Gadsby. It is therefore urged upon the hearing before the auditor that the petitioners cannot recover in this proceeding.

Not regarding the question thus made as any part of the reference herein, I have stated the account in the light of the contract, exhibits, and proofs, hereto appended.

The sum of $795.00 I find to be due on the original contract, and the sum of $1,504.20 for extras, aggregating the sum of $2,299.20, from which I deduct the sum of $248.50 paid by John C. Harkness,

trustee, on account of work and material furnished by petitioners, leaving a balance due petitioners of $2,050.70, with interest from the 30th April, 1873, as shown by Schedules A, B, and C, hereto appended.

It appears by the proofs that Thomas M. Plowman, architect and superintendent of the work, revised petitioners' claim for extras, and adjusted the same by deducting therefrom the value of omissions of work and material provided to be done under the contract, thereby entitling petitioners to full amount provided to be paid them by the contract, as well as the further amount stated for extras.

All of which is respectfully submitted.

March 16th, 1877.

THOMAS HOOD, *Auditor.*

* * * * * * *

181 JOHN H. MCBLAIR, a witness of lawful age, produced on behalf of petitioners, Williams & Gallant, being duly sworn, deposes & says:

Examined by Mr. MORRIS:

My name is John H. McBlair; I reside in this city.

The contract, Exh. W. & G. No. 1, is handed to witness and he states:

"That is my signature." I had no authority from anybody to act as a party to the contract in question; I assumed to bind the estate without any authority. I did not inform Messrs. Williams & Gallant or either of them that I had no authority to act in the premises. I signed the contract, and they may have thought I had the authority. I expected these gentlemen to get paid for their work from money coming to me for the sale of property to the District government; the property was mine, and which I had purchased from the estate. I gave a note for this purchase and paid no money. I expected, however, to make a settlement for this
182 purchase with the estate, but as yet I have not done it. In this settlement I intended to charge whatever it cost for the remodeling the buildings. I suppose the estate would give me credit for what improvements I put upon the buildings. I have no particular reason for saying that I expected the estate to give me credit for the improvements, except that I improved the property and benefited the estate. I consider that these improvements have benefited the estate. The reason I did not sign my own name to the contract was because it did — occur to me and I did not think there would be any after-clap about the matter.

Q. How did Mr. Ten Eyck regard this procedure of yours?

A. I have not had any communication with him for five years, and should have disregarded his opinion, as he has no authority in the premises. I consider that Walter S. Cox, trustee, was the only person authorized to employ me to make the contract for the improvements.

Q. You have stated that Mr. Ten Eyck had no rights in the premises. Did he not have as much right in the management of the estate as you?

A. He certainly had as much right as I had.

Q. Was he or his family in Washington about that time?

A. No, sir; the improvements were nearly finished before he knew anything about it I presume. If he got any information on the subject he did not obtain it through me or my family.

Q. Are you and Mr. Ten Eyck on good terms?

A. He stayed at my house when he was last here, and we were then on good terms, but I have not heard from him since.

183 Q. When was that, Major, that he stayed here last?

A. I think in 1870 or 1871.

Q. You say that — he nor any of his family were here during these improvements?

A. I did; they were not.

Q. Was it not an unusual proceeding for you to undertake to improve property in which the Ten Eyck family were equally interested with your own without any consultation with them?

A. It was.

Q. What explanation do you give of it?

A. The explanation is this, that the property wanted improving and Ten Eyck, who had great influence with his wife, who is the party in interest, not he, always opposed any scheme to improve the estate, and that Walter S. Cox, the trustee, is so overprudent that if I left the matter with them nothing would have been done for ten years, probably.

Q. Are we to understand, then, that these improvements were made not only without the knowledge, but even against the wish, of the Ten Eyck family?

A. I think the answer to the other question covers that, and I have no further answer to give to this question.

Q. Did not these men, Williams & Gallant, understand that they were dealing with you as the representative of the Gadsby estate?

A. Very likely they did.

Q. Did you take any means to disbelieve them of that idea?

A. I did not; the question was never mooted.

Q. What occasion was there for mooting the question
184 when you, in your contract, held yourself out as the representative of the estate?

A. I know of none.

Q. Under ordinary circumstances would such action on your part be considered entirely fair to Williams & Gallant?

A. I certainly did not intend to do them any wrong.

Q. Did you consider it as doing them wrong to hold yourself out as what you were not and thereby induce them to enter into a contract which you say you were not authorized to make?

A. No; I do not; did not intend to do so, as they might at any moment — ascertained from the trustee what my position was in the premises.

Q. Do you know that they knew there was any trustee?

A. I do not.

Q. How could they have ascertained it, then?

A. By applying to Mr. Cox.

Q. Why should they have applied to Mr. Cox when they did not know he was trustee?

A. That I cannot answer. [To show that I did not intend to do Messrs. Williams & Gallant any wrong I desire to state that they have been paid, under their contract, within $150 or $200, and their claim now is for extras, for which I hold they are not entitled to $1.00, and which, I think, I can show before we get through with this case].

(That portion of witness' answer contained within the brackets is objected to as not being responsive to the question.)

Q. When the Ten Eyck family found out about these improvements what did they say or do about them?

185 A. I cannot tell you. I told you before that I had not had any communication with them for five years.

Q. I suppose, of course, that your own family were not in the same ignorance about the progress of the work as were the Ten Eycks?

A. They were not ignorant of the progress of the work.

Q. Were they willing that it should go on?

A. I don't think I asked their consent.

Q. They all knew you were going to make them (improvements) before you commenced them, did they not?

A. They certainly did.

Q. Were they willing that you should make them?

A. They made no objection. They were about there all the time. They lived there at the commencement of the work. I presume they approved of my going on with the improvements—certainly they did.

Cross-examination by Mr. R. H. HARKNESS:

Q. Were not your wife and children under the impression that you had authority, direct or indirect, under the decree of the court by which Mr. Cox was appointed trustee to sell, to make this contract?

A. I presume they thought I had; I don't know, though. My explanation in regard to the language "after-clap" is that I had received bonds, guaranteed at 97 — on the dollar, of the District government, and knew at that rate everything would have been settled; but on making application to make the guarantee good it was refused. I had to dispose of some of the bonds at a great

186–260 loss. If the guarantee had been made good every proper account would have been settled at this time and there would have been no "after-clap," as I termed it, meaning thereby that there would have been no trouble.

J. M. McBLAIR.

5th. That your petitioners may have such further and other relief as to your honors may seem right and proper — the premises.

MERRICK & MORRIS &
WM. JOHN MILLER,
Sol's for Petitioners & Assignees.

Service acknowledged.

W. S. COX.

(Indorsed:) 1355, equity. McBlair *et al. vs.* McBlair *et al.* Amended petition of Williams & Gallant praying that Walter S. Cox be made a party to said petition, &c. Filed April 24, 1877. R. J. Meigs, clerk.

265 *Order Allowing Amended Petition of Williams & Gallant to be Filed.*

In the Supreme Court of the District of Columbia.

McBLAIR *et al.*
vs.
McBLAIR *et al.* } Equity No. 1355.

On consideration of the amended petition of Williams & Gallant it is, this 24th day of April, A. D. 1877, ordered *have been* and hereby is, granted to said petitioners to file said amended petition and also to make Walter S. Cox, Esq., trustee, a party to said petition, a copy of said petition being served on said Walter S. Cox, Esq.

By the court: A. W.

(Indorsed:) 1355, equity. McBlair *et al. vs.* McBlair *et al.* Order granting leave to file amended petition. O. B. 6, p. 150. Filed April 24th, 1877. R. J. Meigs, clerk.

266 *Separate Answer of Walter S. Cox to Petition of Williams & Gallant.*

Sup. Court, Dist, of Col.

AUGUSTA McBLAIR *et al.*
vs.
J. H. McBLAIR *et al.* } 1355, E. Doc. 9.

Answer of W. S. Cox to the petition of Thomas Williams and Wm. G. Gallant, filed with above cause.

Respondent says that no part of the sum of $24,521 for which the lots referred — in said petition were sold ever came into his hands. For the history of said matters he refers to the proceedings on the petition of the District of Columbia in this cause and the evidence taken thereunder.

Respondent submits that it was unnecessary to make him a party to the said petition of Williams & Gallant, and that the relief prayed as far as he is concerned is impracticable.

WALTER S. COX.

I solemnly swear that the facts stated in the aforegoing answer are true to the best of my knowledge and belief.

WALTER S. COX.

Sworn to this — day of May, A. D. 1877.

——— ———.

(Indorsed:) McBlair *et al. vs.* McBlair *et al.* Answer of W. S. Cox to petition of Williams & Gallant. Filed May 25th, 1877. R. J. Meigs, clerk.

267 *Decree of Court Affirming Report of Auditor.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } No. 1355.

This cause coming on to be heard on the petition of Thomas Williams and William G. Gallant and the proceedings thereunder, and to the exceptions to the auditor's report, filed on the 7th day of April, 1877, and the same having been duly read and argued by counsel and duly submitted to the court, and on consideration thereof by the court, it is, this 13th day of December, A. D. 1877, ordered, adjudged, and decreed that said exceptions be, and the same are hereby, overruled; and, further, that said auditor's report be, and the same is hereby, ratified and confirmed; and, further, that the said sum of $2,050.70, with interest from the 30th day of April, 1873, found to be due and payable by said auditor's report to said petitioners to the use of J. and J. E. Libby and Jacob H. Kengla be, and the same is hereby, declared a lien on the proceeds of sale of said vacant lots mentioned and described in this cause and sold by said Walter S. Cox, Esq., trustee in said cause.

And, further, that said Walter S. Cox, as trustee, be, and he is hereby, directed and ordered to proceed to collect from the purchaser or purchasers of said vacant lots the purchase-money and interest due thereon and then pay said petitioners' assignees or their solicitors of record the said sum of $2,050.70 and interest, together with the costs and expenses incurred by said petitioners or their assigns on said petition; and, further, if said purchase-money and interest be not paid to him said Walter S. Cox, as trustee, be, and he is hereby, instructed to proceed to advertise and sell said vacant lots under the same terms and conditions in the orginal decree of sale prescribed at the cost and risk of said purchaser or purchasers; and, further, if said purchase-money should not be sufficient to pay said sum of $2,050.70, interest and costs, then said John C. Harkness, as trustee, be, and he is hereby, directed and ordered, out of any moneys in his hands or which shall come into his hands as trustee under the decree appointing him trustee

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of Gadsby's estate, to pay said petitioners' assigns whatever money be necessary to pay said sum of $2,050.70, interest and costs, and from this decree said complainants and defendants in said cause and said John C. Harkness, trustee, appeal, which is allowed, on complying with the rules of the court in cases of appeal, on giving bond, with security, in five hundred dollars.

By the court:

——— ———.

(Indorsed:) No. 1355, equity. McBlair *vs.* McBlair. Decree on petition of Williams & Gallant ordering payment of $2,050.70, in'st from 30th April, 1873, and cost of said —. M. 12, p. 569. Filed Dec. 13th, 1877. R. J. Meigs, clerk.

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273 *Resignation of Walter S. Cox as Trustee.*

In the Supreme Court of the District of Columbia, Holding an Equity Court.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } No. —.

To the honorable the justices of the supreme court of the District of Columbia, holding an equity court:

Your petitioner, Walter S. Cox, respectfully shows unto your honors that he was, by a decree of your honorable court, appointed trustee in the above-entitled cause to make sale of the real estate referred to in said cause.

2nd. That he made sale of said real estate to said John H. McBlair, as will appear by the report of your trustee and the proceedings had on said report.

3rd. That said McBlair has not paid the promissory notes given for the deferred payments of said real estate.

4th. That, by a decree passed in said cause on the petition of —— Williams and —— Gallant, your trustee was charged to demand payment of said notes, and, if not paid, to resell said real estate at cost and risk of said John H. McBlair.

5th. Your trustee shows that since the passage of said decree he has been appointed and qualified as one of the justices of your honorable court, and believing that his duties as trustee in said court and also as a justice of said court would be inconsistent with each other, and further believing it would be to the interest of all
274 parties interested in said cause, your trustee hereby tenders his resignation as trustee, and prays to be relieved of his duties as trustee and a new trustee be appointed in his place and stead, with all the powers vested in your trustee, your trustee hereby tendering himself ready to turn over to the new trustee all papers and notes in said cause.

WALTER S. COX.

(Indorsed:) 1355, equity doc. 9. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Petition and resignation of Walter S. Cox as trustee. Filed Feb. 20, 1880. R. J. Meigs, clerk.

275 In the Supreme Court of the District of Columbia. Special Term, February, 1880.

The special term in equity for February, 1880, met this 3d day of February, 1880, pursuant to assignment, Justice Charles P. James, presiding.

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Decree Appointing Miller Trustee in Place of Cox, Resigned.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.*
} 1355, Equity Docket 9.

This cause coming on to be heard on the petition of Walter S. Cox, trustee, in the above-entitled cause, and the same being duly submitted and considered by the court, it is, this 20th day of February, A. D. 1880, by the court ordered, adjudged, and decreed that the resignation of said Walter S. Cox as trustee in said cause be, and the same is hereby, accepted; and, further, that said Walter S. Cox be, and he is hereby, discharged as said trustee.

And, further, it is ordered, adjudged, and decreed that William J. Miller be, and he is hereby, constituted and appointed trustee in the place and stead of the said Walter S. Cox; and, further, that the said William J. Miller be, and he is hereby, vested with all the powers and authority conferred upon the said Walter S. Cox by said decree appointing said Walter S. Cox trustee; and, further, that said William J. Miller be, and he is hereby, vested with all the power, authority,
276 and directions conferred upon said Walter S. Cox by the decree of the court passed in said cause in the matter of the petition of Williams and Gallant; and, further, that said William J. Miller, as trustee, shall file in this cause his bond to the United States in the penalty of thirty thousand dollars, with surety, to be approved by the court or one of the justices thereof, conditioned for the faithful discharge of the duties as trustee in the premises and of such other and further order and decree that may be passed in the premises; and, further, that said William J. Miller, as trustee, shall proceed to perform the duties required of said Walter S. Cox by the said decree; and, further, it is ordered, adjudged, and decreed that said Walter S. Cox turn over to said William J. Miller all promissory notes, bonds, and other papers in this cause; and, further, that thereupon the bond of said Walter S. Cox as trustee be, and the same is hereby, cancelled.

CHARLES P. JAMES, *Justice.*

15 Minutes, p. 350.

(Indorsed:) 1355, equity doc. 9. Augusta McBlair *et al. v.* John G. McBlair *et al.* Decree accepting resignation of Walter S. Cox as trustee. Decree appointing William J. Miller trustee, &c.; bond $10,000; also cancelling bond of Walter S. Cox, &c., &c. Filed Feb. 20, 1880. R. J. Meigs, clerk.

277–289 *Receipt of Miller, Trustee, of Notes of J. H. McBlair.*

In the Supreme Court of the District of Columbia.

McBLAIR *et al.* *vs.* McBLAIR *et al.* } 1355, Equity Doc. 9.

I hereby acknowledge that I have received of Walter S. Cox, late trustee in the case of Augusta McBlair *et al. vs.* John G. McBlair *et al.*, No. 1355, equity doc. 9, two promissory notes of J. H. McBlair, dated June 11th, 1872, each for $12,260.75, payable to the order of said Walter S. Cox, trustee, respectively, in 3 and 6 months after date.

Feb. 27, 1880.

WM. J. MILLER, *Trustee.*

(Indorsed:) 1355, equity doc. 9. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Receipt of Wm. J. Miller, trustee, to Walter S. Cox, late trustee, of two promissory notes of John H. McBlair. Filed Feb. 27, 1880. R. J. Meigs, clerk.

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290 *Decree Ordering Resale of Property.*

In the Supreme Court of the District of Columbia. In Equity.

AUGUSTA McBLAIR *et al.* *vs.* JOHN G. McBLAIR *et al.* } No. 1355.

This cause coming on to be heard on the report of William J. Miller, trustee, filed in the above-entitled cause, and the same having been duly argued by Martin F. Morris, solicitor for Williams & Gallant, Francis Miller, solicitor for the District of Columbia, and E. C. Ingersoll, solicitor on behalf of said McBlair and Ten Eyck, and duly submitted to and considered by the court, it is, this first day of June, A. D. 1880, ordered, adjudged, and decreed that said trustee proceed to readvertise and sell the real estate heretofore sold to John H. McBlair at the cost and risk of said John H. McBlair, the defaulting purchaser; and, further, that the offer of said Jacob H. Kengla and Joseph Libby be, and the same is hereby, rejected.

A. B. HAGNER,
Asso. Justice.

(Indorsed:) 1355, equity. McBlair *et al. vs.* McBlair *et al.* Decree ordering trustee to proceed to readvertise & sell. M. 6, p. 24. Filed June 1, 1880. R. J. Meigs, clerk.

291 *Defendants' Appeal from Decree of June* 1, 1880.

In the Supreme Court of the District of Columbia. In Equity.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } No. 1355.

The clerk will enter an appeal to the general term from the order made in this cause at the special term of this court on the 1st day of June, 1880. This appeal is made in behalf of the defendants, John G. McBlair, Virginia Smith, J. H. McBlair, Julia I. McBlair, Charles Ridgely McBlair, A. Jackson McBlair, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, May Ten Eyck, John C. Ten Eyck, and John C. Harkness, trustee.

June 28th, 1880.

CUPPY & INGERSOLL &
MATT. H. CARPENTER,
Sol. for the Above-Named Defendants.

As no supersedeas is desired, the bond may be in the penalty of $100.

June 28, 1880.

A. B. HAGNER,
Asso. Justice.

(Indorsed:) In equity. No. 1355. Sup. court of the Dist. of Col. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Notice of appeal. Filed June 29, 1880. R. J. Meigs, clerk, by M. A. Clancy, ass't clerk. Cuppy & Ingersoll, & Matt. H. Carpenter, sol's.

292 *Appeal of District of Columbia from Order of June* 1, 1880.

MCBLAIR
vs.
MCBLAIR. } In Equity. 1355.

JULY 1, 1880.

The clerk will please enter an appeal for the District of Columbia from order of June 1, 1880.

FRANCIS MILLER,
Assistant Attorney D. C.

Appeal as ordered entered July 1, 1880, by the clerk, Order Book 7, p. 202.

293 *Petition of Williams and Gallant.*

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

AUGUSTA MCBLAIR and JULIA TEN EYCK, Complainants,

vs.

JOHN G. MCBLAIR, VIRGINIA SMITH, J. HOLLINS, MCBLAIR, Jr., Julia McBlair, C. Ridgely McBlair, A. Jackson McBlair, Augusta Ten Eyck, Maria Newton, John A. McIntyre, Mary E. MacDonald, Delosia Davidson, by Their Next Friend, Wm. H. Philip; Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, John C. Ten Eyck, Albert Newton, Maria McCormick, Margaret Wallace, Margaret S. Chapman, Laura E. Baker, Mary Page, Thomas H. Davidson, and William A. McIntyre, Defendants.

To the honorable the justices of the supreme court of the District of Columbia, holding an equity court:

Your petitioners, Thomas Williams, and William G. Gallant, trading under the name, style, and firm of Williams & Gallant, to the use of Joseph Libby and J. E. Libby, trading as J. and J. E. Libby, — Jacob H. Kengla, respectfully show, represent, and aver as follows:

1. That heretofore, to wit, on the 30th day of July, A. D. 1868, the above-named complainants filed their bill of complaint in your honorable court against the above-named defendants, alleging,
294 among other things, that John Gadsby, father of said Augusta McBlair and Julia Ten Eyck, died in the District of Columbia in 1844 after making and publishing his last will and testament, whereby he devised to Provy Gadsby, James Eakin, and Alexander McIntyre and the survivors of them the following real estate (among other property) in trust after the expiration of twelve months from his death to permit his daughters to receive the rents, issues, and profits of the lots of ground in Washington city known as lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, in square No. 78, for the sole and separate use and enjoyment, in equal moieties for life, respectively, so that neither said property nor the income thereof should be subject to the control or disposition of the respective husbands of his said daughters or responsible for their debts, &c., and in case either of his said daughters should die leaving no issue living at the time of her death that the interest or estate of her so dying without issue should become forthwith vested in the survivor in the same manner as her own moiety was before held and enjoyed; and in case both or either of his said daughters should die leaving issue living at the time of her death, then his said trustees should hold the property to the use of said issue, one moiety to each of said daughters, or in case one of them only should die leaving such issue, then, after the death of the other daughter, the whole of said property should vest in said issue in fee

simple; and that the contingency of the death of both of his said daughters without issue was not provided for by said testator, and consequently, in that event, said property would revert to his right heirs; and, further, that of the said lots of ground Nos. 8, 9, and 10 front on I street in said city,
295 and were improved by a substantial row of dwellings, six in number, and all the other said lots being vacant and unimproved, except where partially occupied by outbuildings, and that said dwelling-houses were of considerable value and if properly improved would yield a good income and revenue, which would inure to the benefit of all parties interested, but that they were out of repair, old-fashioned, and unprovided for with modern conveniences; that the vacant lots in the rear front on K street north, yielded no income, but would sell, and it would be greatly for the advantage of all parties to make sale of said lots and apply the proceeds to the improvements of said dwelling-houses, and that they (complainants) had not the means to make such improvements, the income accruing to them from their father's estate being wholly inadequate to their support, and said complainants by their said bill give as additional reason for such sale *was* that said vacant lots were burdensome to them by reasons of the heavy municipal taxes to which they were subject, so that their retention defeated the primary object of the testator, which was not to burden said complainants, but to provide for them an ample revenue for their comfortable support; and, further, by their said bill gave the names of said John Gadsby and the children of said Augustia McBlair and Julia Ten Eyck and also the heirs of Alexander McIntyre, and making them defendants to said bill. Complainants then prayed by their said bill that a decree be passed making a sale of said vacant lots for the object set forth above, as will more fully appear by reference to said bill filed in this cause and made part hereof if need be.

2. That said cause was referred to Special Auditor Christopher Ingle, Esq., to take proof and report on the advisability of sale;
296 and, further, that said Special Auditor Ingle did take proof and made his report to your honorable court advising sale of said real estate for the purpose and object stated in said bill, as will appear by said report.

3. That afterwards, on or about the 10th day of May, 1869, said cause came on for hearing on said bill, answers, and auditor's report, and a decree was passed therein decreeing a sale of said lots and appointing Walter S. Cox trustee to make said sale of the property described in said bill, and the auditor's report and depositions returned by said auditor, as will appear by said decree, which is made part hereof if need be.

4. That afterwards said Walter S. Cox, as trustee, reported to the court that he had sold said property, to wit, lots 14, 15, 16, 17, 18, 19, 20, & 21, and the north 23 feet and 5 inches of lot 13, in square No. 78, to John H. McBlair (who is the husband of said Augusta McBlair, one of the complainants) for $24,521.50, for which he, as trustee, took from said John H. McBlair (for the purchase-money) two promissory notes of said John H. McBlair, each for $12,260.75,

bearing date on or about — day of June, 1872, payable, respectively, in three and six months after date, with interest; and thereupon your honorable court, on the 13th day of June, A. D. 1872, passed an order that the parties interested (in said cause) show cause, on or before the 15th day of July, 1872, next, why said sale should not be ratified and confirmed, as will appear by said decree, which will be made part hereof if need be.

5. That the said decree of sale contained a clause that "a lien be reserved on said property for said purchase-money, and on the ratification of such sale and full payment of the purchase-money
297 said trustee shall convey the property sold to the purchaser."

6. That your petitioners are informed and believe that the said John H. McBlair never paid to said Walter S. Cox, trustee, said purchase-money, nor did he, the said John H. McBlair, ever receive a deed for said property, as will appear by the answer of said Walter S. Cox filed to the petition of your petitioners in this cause, which your petitioners pray leave to read and make part hereof if need be.

7. That afterwards the said John H. McBlair and his wife, Augusta McBlair, by their deed bearing date the 26th day of July, A. D. 1872, sold and conveyed said lots and part of lot to the District of Columbia for and in consideration of $26,521.50, as will appear by said deed, recorded in Liber 694, folio 14, one of the land records of the District of Columbia, which your petitioners pray leave to read and refer to and make part hereof if need be.

8. That afterwards, on the 29th day of July, A. D. 1872, your petitioners entered into a written contract with said John H. McBlair, agent of the estate of said John Gadsby (of which the said complainants and defendants in the above-entitled cause are the heirs and devisees), to remodel and remodernize the said dwelling-houses on said I street and referred to in said bill of complaint; and, further, that your petitioners did complete and finish said houses, and on completion of said dwelling-houses your petitioners claimed a balance due them on said contract and for extra work, $2,299.20; and, further, that said balance not having been paid to your petitioners, your petitioners, on or about the 14th day of July, A. D. 1876, filed their petition in the above-entitled cause, to the use of said J. & J. E. Libby and Jacob H. Kengla, against the said complainants and the defendants, McBlairs and Ten Eycks
298 and John H. McBlair and others, and also against John C. Harkness, as trustee of said John Gadsby's estate, setting forth that your petitioners had done the work on said houses and expected to be paid out of the proceeds of sale of said lots, and that said complainants and other parties to said equity cause and said John C. Harkness, trustee aforesaid, well knew that your petitioners were doing the work on said houses, and prayed that said John C. Harkness, as trustee hereinafter mentioned, pay to your petitioners, to the use of said J. & J. E. Libby and Jacob H. Kengla, said balance, $2,299.20, as will appear by said petition; and, further, said petition of your petitioners, with the answer thereto, depositions and auditor's report on said petition and exceptions to said auditor's re-

port, came on for hearing before your honorable court, and on the 13th day of December, 1877, your honorable court passed a decree overruling said exceptions to said report, and found that the sum of $2,050.70, with interest from the 30th day of April, 1873, to be due and payable to your petitioners, to the use of said J. & J. E. Libby and Jacob H. Kengla; further, by said decree declared the same a lien on the proceeds of sale of said lots and part of lot sold by Walter S. Cox, trustee, and further directed and ordered said Walter S. Cox, as trustee, to proceed to collect from said purchaser or purchasers of said lots the purchase-money and the interest due thereon, and then pay your petitioners, to the use of said J. & J. E. Libby and Jacob H. Kengla, or their solicitors the said sum of $2,050.70 and interest, together with the costs and expenses incurred by your petitioners or their assigns.

And further decreed, if said purchase-money and interest
299 was not paid, then said Walter S. Cox, as trustee, was directed to proceed to readvertise and sell said lots under the same terms and conditions as in the original decree of sale prescribed, at the cost and risk of the said purchaser or purchasers; and, further, if said purchase-money should not be sufficient to pay said sum of $2,050.70, interest and costs, then said John C. Harkness, as trustee, was and is directed and ordered by said decree, out of any moneys in his hands or which should come into his hands, as trustee, under the decree appointing him trustee of Gadsby's estate, to pay your petitioner or his assigns, said Libby & Libby & Kengla, whatever may be necessary to pay said sum of $2,050.70, interest and costs, as will more fully appear by said decree, which is made a part hereof.

9. Your petitioners further show they are informed and believe, and so believing aver, that the said purchase-money not having been paid by the said John H. McBlair for said lots and part of said lot, and the District of Columbia having some apprehension as to its title to said lots and part of lot, filed its petition in your honorable court in the above-entitled cause claiming it had purchased from said John H. McBlair the aforesaid lots and part of lot in consideration of $26,000 in bonds, and that said John H. McBlair and his wife, Augusta McBlair, had conveyed, by deed, said lots to said District, and prayed an account of the expenditures made of said proceeds of said bonds on the real estate of the said complainants and defendants in this cause by said John H. McBlair, and also that said promissory notes given by said John H. McBlair to said Walter S.
Cox, as trustee, be cancelled, and that the said Walter S. Cox be
300 directed to convey said lots to said District; and, further, on the hearing said petition of said District and proof taken thereon, your honorable court, on the 7th day of August, 1875, passed an order and decree directing the said Walter S. Cox, as trustee, to execute and deliver a conveyance of said lots and part of lot to said District of Columbia; and, further, to surrender said promissory notes of said John H. McBlair to the said John H. McBlair as though the said notes had been paid, from which said decree an appeal was taken, and, on the 7th day of August, A. D. 1875, your honorable court, holding a general term, on the 4th day of March,

A. D. 1876, reversed said decree with costs and remanded said cause to your honorable court, holding a special term, to be further proceeded with as the parties might be advised and without prejudice to the right of the defendants, The District of Columbia, to proceed in said cause or any other suit as it might be advised or was entitled to.

10. That, on or about the 26th day of April, 1871, the said Julia Ten Eyck and others filed their bill of complaint in your honorable court against said Augusta McBlair and others, being equity cause No. 2368, and, among other things, prayed the appointment of new trustees in place and stead of Provey Gadsby, James Eakin, and Alexander McIntyre, trustees and executors in the last will and testament of John Gadsby, deceased, and in said equity cause No. 2368 mentioned, and your honorable court, on the 4th day of May, A. D. 1872, appointed John C. Harkness, Esq., trustee in place of the said Provey Gadsby, James Eakin, and Alexander McIntyre, deceased.

11. That the said Honorable Walter S. Cox having been
301 appointed and qualified as one of the justices of your honorable court, he, on or about the 20th day of February, 1880, resigned his office as trustee aforesaid, and your honorable court accepted said resignation and constituted and appointed William J. Miller trustee in place and stead of said Honorable Walter S. Cox and vested said Miller, as trustee, with all the power and authority conferred on said Walter S. Cox by said decree, and, further, by said decree, vested the said Miller, as trustee, with all the power and authority and directions conferred on said Walter S. Cox by the decree of your honorable court passed in this cause in the matter of said petition of Williams & Gallant to the use of your petitioners.

12th. That said John H. McBlair, purchaser of said lots and part of lot, having failed to pay the purchase-money and interest on said lots, the said William J. Miller, as trustee in place of said Walter S. Cox, called on said John H. McBlair to pay said purchase-money and interest, and, said McBlair still refusing to pay the same, the said William J. Miller, as trustee, readvertised said lots and part of said lot to be sold at public auction in front of the premises on 28 day of April, 1880, at 5 o'clock p. m., on the same terms and conditions as prescribed in the said original decree; that at said date and hour the said Miller, as trustee, attended at said place and offered said real estate for sale, when Francis Miller, Esq., attorney of said District of Columbia, publicly gave notice to all persons as intending purchasers that the said District of Columbia held the fee-simple title to said lots and part of lot and the improvements thereon and whoever bought would buy with that notice; and, further, that immediately after the above announcement so made by said Francis Miller, Esq., Edward C. Ingersoll, attorney of your honorable court,
at said sale also publicly announced to all persons present
302 at said sale words to the following effect: "That he, as attorney, gave notice, on behalf of the heirs of John Gadsby, to all intending purchasers that the said District of Columbia did not own the fee simple to said lots and part of lot, and thereupon said trustee, receiving no bid for said property, withdrew the same from sale and

made his report to your honorable court; and, in consideration of said report, your honorable court, on the 1st day of June, A. D. 1880 (after hearing arguments from Martin F. Morris, Esq., solicitor for said Williams & Gallant, and Francis Miller, Esq., solicitor on behalf of the District of Columbia, and E. C. Ingersol, Esq., solicitor on behalf of said McBlair and Ten Eycks), decreed that said William J. Miller, trustee, proceed to readvertise and sell said real estate, to wit, said lots and part of lot heretofore sold to said John H. McBlair, at the cost and risk of said John H. McBlair, the defaulting purchaser."

13th. That afterwards, in pursuance to the last-mentioned decree, the said William J. Miller, as trustee, did readvertise said real estate to be sold on the — day of ——, A. D. 1880, at -- o'clock p. m., in front of said premises, at public auction; and, in pursuance to said advertisement, said William J. Miller, as trustee, did then and there, through Walter B. Williams & Co., auctioneers, offer said real estate for sale at public auction, when said E. C. Ingersol, Esq., again publicly gave notice and stated to all persons present words to the following effect: "That he, as attorney for the Gadsby heirs, gave notice to all intending purchasers that the Gadsby heirs claimed the title to said real estate, and whoever purchased would pur-
303 chase a lawsuit and would take with that notice," or words to that effect; and thereupon, no one bidding over $20,000 for said property, said trustee withdrew said property from sale, the value of real estate and improvements thereon being valued, in a perfect fee title, by said trustee at $60,000.

14th. That your petitioners are informed and believe, — so believing aver, the fact to be that said Gadsby heirs, by and through said John C. Harkness, as trustee, and the District of Columbia have got into litigation on the common law side of your honorable court as to said lots and part of lot, the lawsuit being as follows: John C. Harkness *vs.* District of Columbia, at law, No. 16602, ejectment fr. lots 14 to 21, both inclusive, and part of lot 13, in square No. 78, and said suit is still pending.

15th. Your petitioners further show they are informed and believe, and so believing say and aver, the complainants' bill in this cause was filed under an act of Congress entitled "An act to authorize the circuit court of the District of Columbia to decree sale in certain causes," and further assuming that at the date of the filing of said bill the condition of the title was such as to authorize proceedings under the act referred to, yet the following irregularities appear in the said proceedings, to wit:

1st. The bill of complaint, while averring that the children of William Gadsby have a contingent interest in the property, fails formally to make them party defendants, although their names are included in the process of the court.

304 2nd. The said bill seeks only a sale of lots 8 to 19, inclusive, in square No. 78, and neither in said bill, answers, or exhibits therewith filed is it alleged, claimed, or admitted that lots 20 and 21 are subject to the trust declared in the will of said John Gadsby in favor of complainants and their issue; and,

3rd. The proceedings show no service of process upon the infant

defendants, C. R. McBlair, A. Jackson McBlair, Jane Ten Eyck, and Mary Ten Eyck, nor that they were produced in court, nor any answer by them through guardian *ad litem;* and, further,

4th. The proceedings show the infant defendants, Jane and Mary Ten Eyck, to be non-residents, and no commission issued to appoint guardian *ad litem;* and,

5th. The proceedings show no service of process or publication against the defendant, Margaret S. Chapman, one of the heirs of John Gadsby; and, further,

6th. The answers of the infant defendants, Jane Ten Eyck and Mary Ten Eyck, in proper person (they not being shown to be over 14 years of age), and their answers not "under oath," as required by the second section of the act of Congress referred to, and your petitioners show that they are advised, and being so advised say, that the irregularities above set forth are sufficient to invalidate the title to said lots and part of said lot under the decree of sale in said above-entitled cause.

16th. Your petitioners further say that they are advised,
305 informed, and believe, and so believing say, that no such condition of title to said lots and part of lot set forth in said bill existed at the inception of the said proceedings as to confer jurisdiction on your honorable court under said act of Congress of A. D. 1856. The said act provides that, "In all cases in which real estate within the District of Columbia shall have been limited heretofore or shall be limited hereafter by the provisions of any deed or will to one or more — for life or lives with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents and — the said deed or will containing the limitation shall not prohibit a sale the circuit court for the District of Columbia, upon application of the tenant for life, shall have power to decree a sale of such real estate if upon the proofs it shall be of the opinion that it is expedient to do so, and to decree to the purchaser an absolute and complete title in fee simple."

And, further, your petitioners aver that, although the proceedings under said act seems to have been founded upon what purports to be a copy of the last will and testament of said John Gadsby, and which supposed copy of said will is filed with said bill as Exhibit A, yet, on comparing it with the original will of said John Gadsby as probated and recorded in the office of the register of wills of the District of Columbia, it will be seen that said copy or Exhibit A is not a copy of said will as in said copy or Exhibit A. Said lots are described "as lots numbered, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,
and 19, in square No. 78," whereas said lots in said original
306 will are described as lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,
and 19, in square numbered seventy-six, and are devised and limited upon the trust set forth in said will and bill mentioned; and, further, it will be found on examination of said original will that the lots in square numbered seventy-eight are devised under a general clause in fee to his executors, Provy Gadsby, James Eakin, and Alexander McIntyre, in trust to pay debts, with power to sell and convey for that purpose, and after payment of debts the balance

in property or proceeds of sale to be equally divided between said testator's five children, said Augusta McBlair, Julia Gadsby (now Ten Eyck), Margaret S. Chapman, Ann Sophia Newton, and William Gadsby.

17th. Your petitioners further show they are informed and believe, and so believing say, that said testator died seized and possessed of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19, 20, 21, 22, 28, 29, and 30, in square No. 76 (seventy-six).

18th. Your petititioners further show and aver that they are informed and believe that the said John C. Harkness, as trustee of said John Gadsby's estate, has been in full possession of said dwelling-houses so remodeled by your petitioners since the same were completed, to wit, since 1873, and has been collecting and receiving the rents thereof for the benefit of said complainants and other heirs of said John Gadsby.

19th. Your petitioners, from information and belief, further show and aver that under said complainants' bill of complaint and
307 the proceedings had thereon it is utterly impossible to make sale of said real estate and pass title thereunder.

20th. Your petitioners further show that said John C. Harkness, as trustee of said John Gadsby's estate, has in his hands (as they are informed and believe) bonds, stocks, and moneys and other personal assets of the estate of said John Gadsby to a very large amount, but what amount your petitioners do not know; hence pray said John C. Harkness, as trustee, may by his answer be made to discover and make known what amount of bonds, stocks, moneys, and other personal assets of said estate he holds as trustee, the nature and kind of said bonds and stocks, and also what rents he has collected on said dwelling-houses since the completion of the same, in 1873, and if said houses or either of them be occupied by either complainants or defendants, how long have they or either of them occupied said houses or either of them.

In consideration of the premises, and whereas your petitioners cannot have acquired relief on the common law side of you honorable court, your petitioners pray as follows:

1st. That your honorable court will pass an order commanding and directing said John C. Harkness, trustee, out of the rents of said dwelling-houses, to pay your petitioners the said sum of $2,050.70, with interest from the 30th day of April, 1873, and costs on said petition of Williams and Gallant and this petition.

2nd. That your honorable court will pass an order commanding and directing said John C. Harkness, trustee, out
308–316 of any moneys in his hands as trustee of said estate, to pay your petitioners the said sum of $2,050.70, with interest from the 30th day of April, 1873, and costs of said petition of Williams and Gallant and this petition.

3rd. That your honors will pass an order of decree directing and commanding said John C. Harkness as trustee to sell and dispose of the bonds, stocks, and other personal assets he holds as trustee of said Gadsby's estate, or so much thereof as may be necessary, and out of the proceeds of sale to pay your petitioners the said sum of

$2,050.70, with interest from the 30th day of April, 1873, and costs of the proceedings had on said petition of said Williams and Gallant, and also the cost on this petition.

4th. That your honors will pass a rule on said defendant, John C. Harkness, trustee, to appear and answer this petition and show cause why the prayers of your petitioners should not be granted.

5th. That your petitioners may have such further and other relief in the premises as to your honors may seem right and equity demands, the premises considered, and the nature of the case may require.

MERRICK & MORRIS &
W. J. MILLER,
Sol'rs for Petitioners.

(Indorsed:) 1355, equity. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Petition of Williams and Gallant to use of Libbys and Kengla. Merrick & Morris & W. J. Miller, sol'rs for petitioners. Served copy of this petition and order of court on John C. Harkness Jan'y 20, 1881. F. Douglass, marshal. Filed Dec. 27, 1880. R. J. Meigs, clerk.

* * * * * * *

317 *Order Requiring Harkness, Trustee, to Comply with Decree of December* 13, 1877.

In the Supreme Court of the District of Columbia.

AUGUSTA MCBLAIR *et al.*, Complainants,
vs.
JOHN G. MCBLAIR *et al.*, Defendants. } Equity No. 1355.

It appearing to the court, upon the petition filed in this cause on the 27th day of December, A. D. 1880, by Williams and Gallant, to the use of Libby and Kingla, and the answer thereto of the respondent, John C. Harkness, trustee, that it is impracticable to carry into effect so much of the decree entered in said cause on the 13th day of December, A. D. 1877, as provides for a resale of the lots of ground therein mentioned; and, further, that the amount in said decree found due to the said petitioners yet remains wholly unpaid and unsatisfied, it is thereupon ordered by the court this 3rd day of February A. D. 1881, that the said respondent, John C. Harkness, trustee, do, within thirty days from and after the date hereof, comply with the terms of said decree so far as the same apply to him, and he is hereby ordered and decreed to satisfy the claim and demand of the petitioners from the funds in his hands as trustee of the estate of John Gadsby and the costs of this proceeding.

And from this order the said respondent, John C. Harkness, trustee, prays an appeal to the general term, which is hereby allowed.

By the court:

A. WYLIE.

(Indorsed:) 1355, equity. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Order of court requiring John C. Harkness, trustee, to comply with decree of December 13, 1877. M. 7, p. 10. Filed Feb. 3, 1881. R. J. Meigs, clerk.

318 *Decree — General Term Directing Harkness to Pay Claim of Williams and Gallant.*

In the Supreme Court of the District of Columbia. In Equity.

AUGUSTA MCBLAIR *et al.*
vs.
JOHN G. MCBLAIR *et al.* } No. 1355.

This cause came on to be heard on appeal taken from the decree passed in said cause by the special term of the court, in equity, on the 3rd day of February, A. D. 1881, and the same having been duly considered by the court, it is, this 14th day of June, A. D. 1881, ordered, adjudged, and decreed that the said decree be, and the same is hereby, modified so that the said John C. Harkness, trustee, within thirty (30) days from the date hereof, pay out of the funds in his hands, as trustee of said John Gadsby's estate, to the said Williams' & Gallant's assignees or their solicitors of record the said sum of two thousand and fifty $\frac{70}{100}$ dollars, with interest only from the 13th day of December, A. D. 1877, and also pay the costs of the proceedings had on the several petitions of said petitioners; and, further, that in all other respects said decree be, and the same is hereby, affirmed: and, further, that the said John C. Harkness, trustee, be, and is hereby, allowed credit in his account for the same when paid.

By the court:

MACARTHUR,
For Gen'l Term.

(Indorsed:) 1355, equity. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Decree modifying decree of February 3, 1881, directing trustee to pay Williams' & Gallant's assignees or sol. $2,050.70, interest, &c., and costs. 4 G. T. 141, '2. I acknowledge service of this order. June 16, A. D. 1881. John C. Harkness, per H. W. Ganett, sol's. Filed June 14, 1881. R. J. Meigs, clerk.

319 *Order to Enter Claim of Williams & Gallant Satisfied.*

In the Supreme Court of the District of Columbia, the 15th Day of July, 1881.

MCBLAIR *et al.*
vs.
MCBLAIR *et al.* } No. 1355, Eq. Doc. 9.

The clerk will please enter the claim of Williams & Gallant, to use of J. and J. E. Libby & Jacob H. Kengla, under petition and decree in this cause, fully paid and satisfied debt, interest and costs, by John C. Harkness, trustee.

The amount paid is $2,821.73 (twenty-eight hundred and twenty-one $\frac{73}{100}$ dollars).

MERRICK & MORRIS &
WM. J. MILLER,
Solicitors for Williams & Gallant, to Use of J. & J. E. Libby & Jacob H. Kengla,
Per W. J. MILLER.

(Indorsed:) No. 1355, equity. McBlair *vs.* McBlair. Order to enter paid debt, interest & costs, claim of Williams & Gallant, to use of J. & J. E. Libby & Jacob H. Kengla. Filed July 16, 1881. R. J. Meigs, clerk.

320 *Order to Place Appeal of District of Columbia on General Term Calendar.*

McBLAIR *et al.*
vs.
McBLAIR, DIST. OF COL., *et al.* } In Equity. No. 1355.

The clerk will please place on the calendar of the general term the appeal taken by the District of Columbia on July 1st, 1880.
Nov. 19th, 1885.

H. E. DAVIS,
Attorney for District of Columbia.

Appeal as ordered entered 1885, 11, 19, by the clerk, Order Book 9, p. 343.

321 *Decree Affirming Decree at Special Term of June 1, 1880, and Appeal by District of Columbia.*

In the Supreme Court of the District of Columbia, in General Term.

AUGUSTA McBLAIR *et al.*
vs.
JOHN G. McBLAIR *et al.* } No. 1355, Eq. Doc. 9.

This cause coming on to be heard in the general term on the appeal of the District of Columbia from the decree of the special term passed therein on the first day of June, A. D. 1880, and having been argued by counsel for the parties, respectively, and duly considered, it is by the court in general term, this 1st day of February, A. D. 1887, ordered, adjudged, and decreed that the said decree of the special term be, and the same hereby is, affirmed, and that William J. Miller, the trustee appointed by the court for the purpose, be, and he hereby is, authorized and directed to readvertise and resell the real estate heretofore sold to John H. McBlair, at the risk and cost of the said John H. McBlair, the defaulting purchaser;

and from this decree the District of Columbia prays an appeal to the Supreme Court of the United States, which is allowed.

CHARLES P. JAMES, *Justice.*

(Indorsed:) No. 1355, eq. doc. 9. Augusta McBlair *et al. vs.* John G. McBlair *et al.* Decree of general term affirming decree of June 1st, 1880, and directing trustee to resell, &c. Appeal to Supreme Court of the United States. 5 Minutes General Term, page 506. Filed Feb. 1, 1887. R. J. Meigs, clerk.

322 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 21st day of December, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By —— ——,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 21 day of Dec., 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 21st day of December, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By —— ——,
Assistant Clerk.

[Endorsed:] Authentication of record.

323 In the Supreme Court of the United States. October Term, 1887.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
AUGUSTA MCBLAIR and Others, Appellees. } No. —.

It is stipulated and agreed between counsel for the appellant and appellees, respectively, that the above-entitled cause shall be submitted upon printed arguments under rule No. 20, and that upon such submission the following portions of the record only may be printed, namely, the following pages of the transcript of the record filed in the said cause, to wit: The first fifty-three (53) pages; pages one hundred and eight to one hundred and sixteen, both inclusive; pages one hundred and forty-three to one hundred and forty-nine, both inclusive; pages one hundred and fifty-three to one hundred and fifty-five, both inclusive; the deposition of John H.
324 McBlair, on pages one hundred and eighty-one to one hundred and eighty-six, both inclusive; pages two hundred and sixty-one to two hundred and sixty-eight, both inclusive; pages two hundred and seventy-three to two hundred and seventy-seven, both inclusive; pages two hundred and ninety to three hundred and eight, both inclusive; pages three hundred and seventeen to three hundred and twenty-one, both inclusive.

HENRY E. DAVIS,
Attorney for Appellant.
J. J. DARLINGTON,
Attorney for Appellees.

[Endorsed:] Sup. Court U. S. 1887, Oct'r term. No. 1329. The District of Columbia, app'l't, *vs.* Augusta McBlair *et al.* Stipulation to submit under 20th rule and in regard to printing record.

[Stamped:] Office Supreme Court U. S. Filed Dec. 28, 1887. James H. McKenney, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1329. The District of Columbia, appellant, *vs.* Augusta McBlair *et al.* Filed December 28, 1887.

124-320

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1329.

THE DISTRICT OF COLUMBIA, APPELLANT,

against

AUGUSTA McBLAIR AND OTHERS, APPELLEES.

BRIEF IN BEHALF OF THE APPELLANT.

HENRY E. DAVIS,
For the Appellant.

Judd & Detweiler, Printers.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1329.

THE DISTRICT OF COLUMBIA, APPELLANT,

against

AUGUSTA McBLAIR AND OTHERS, APPELLEES.

BRIEF IN BEHALF OF THE APPELLANT.

I.

STATEMENT OF THE CASE.

This cause involves certain real estate in the city of Washington, District of Columbia, known as part of lot 13 and all of lots 14 to 21, inclusive, in square 78. Although the record does not show the fact, the property is improved by the building known as the Western Market, erected by the appellant on Twenty-first and K streets northwest.

The property was part of the estate of John Gadsby, who died in 1844, leaving a will, whereby he devised it, with other of his property, to three trustees, the last survivor of whom was one Alexander McIntyre, who had also died before the filing of the bill. The property in controversy was unimproved, but lots 8, 9, and 10, in the same square and included in the devise to the trustees, were improved by a row of dwelling-houses.

pro confesso above mentioned was as to "all non-resident defendants" (6, folio 11). It is further to be noted (and this applies also to the case of the two Ten Eyck girls), that a second *pro confesso* was made against non-residents and the cause thereupon set for hearing (10, folio 19); and the order of reference made the same day recites a decree *pro confesso* "against the non-resident defendants, *after due publication* [mistranscribed and misprinted 'one public auction'], and also against the resident defendants who have been served with process and have made default," &c. (10, folio 20).* It is wholly immaterial that the mere formal proof of publication as to the non-residents does not now appear in the record; it will be presumed, if necessary.

Returning to the bill, its meritorious averments are (2, folios 3, 4) that the lots 8, 9, and 10 were improved by dwellings and the other lots unimproved, yielding no revenue and a burden in respect of taxes; that the dwellings were out of repair and old-fashioned, and the estate was not productive of sufficient revenue to provide for their proper improvement, while the unimproved lots would sell and it would be to the advantage of all parties to have them sold and their proceeds applied to the improvement of the dwellings; and that relief could be had in the premises only by virtue of the act of Congress of August 18, 1856 (11 Stats., 118). The prayer of the bill is not for the appointment of a new trustee under the will of Gadsby, but for a sale directly of the unimproved lots for the object mentioned, and for general relief.

Such answers as were filed in effect consented to the relief prayed, and the cause came on for hearing on these answers and the decrees *pro confesso*, &c., above mentioned, and was referred to a special auditor (10, folio 20), who reported in favor of the prayer of the bill (11, folio 21). It is true that in the bill no mention was made of the lots 20 and 21, whereas they were mentioned in the testimony accompany-

* Since the transcript of record was filed the clerk's certificate showing this error has been procured and filed.

ing this report. On the coming in of the report the court, on May 10, 1869, passed the following decree (12, folio 23, 24):

This cause coming on to be heard on the auditor's report filed the 8th instant, it is by the court, this 10th day of May, 1869, ordered, adjudged, and decreed that the property described in the bill and the auditor's report and deposition returned by him be sold, and that Walter S. Cox be, and he is hereby, appointed trustee to make such sale, and the manner and course of his proceedings shall be as follows, viz: He shall first file in this cause his bond to the United States in the penalty of eight thousand dollars, with security to be approved by this court or a judge thereof, conditioned for the due discharge of his duties as trustee under this and every future order and decree in this cause; he shall then proceed to make sale of said property at public auction or at private sale, as he may find most expedient, and if at public auction, after giving at least three weeks' previous notice by advertisement in some convenient newspaper of the time, place, and terms of sale, which terms shall be, one-third of the purchase-money to be paid in cash and the residue in two equal installments at six and twelve months after date, with interest, to be secured by approved notes and a lien reserved, and on the ratification of such sale and full payment of the purchase-money he shall convey the property sold to the purchaser, with all the title of the parties to this cause, and, as soon as convenient after any such sale, he shall make report of the same and of the fairness thereof to this court, under oath, and shall bring into court the proceeds of sale to abide the court's future order in the premises.

From this decree no appeal was taken or ever attempted to be taken by or in behalf of any one, and no further step was taken in the cause for above *three years*, when, on June 13, 1872, the trustee, who had in the meantime duly qualified (12, 13), reported as follows (13, folio 26):

The undersigned, trustee in the above-entitled cause, respectfully reports that he has made sale of the lots of ground described in the bill, being lots fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one,

and the north twenty-three feet five inches of lot thirteen, in square No. "seventy-eight," to J. H. McBlair for the sum of twenty-four thousand five hundred and twenty-one $\frac{50}{100}$ dollars; for which sum the said McBlair has passed to the undersigned his two promissory notes, each for twelve thousand two hundred and sixty $\frac{75}{100}$ dollars, payable, respectively, in three and six months after date, with interest.

Thereupon the court confirmed the sale thus reported by the following order *nisi* (14, folio 27):

The trustee in this cause having reported that he has sold lots Nos. 14, 15, 16, 17, 18, 19, 20, and 21 and the north 23 feet 5 inches of lot 13, in square No. 78, in the city of Washington, in the aforesaid District, to J. H. McBlair for $24,521.50, and that the purchaser has passed to him his two notes for the purchase-money, each for $12,260.75, payable, respectively, in 3 and 6 months after date, with interest—

It is, by the court, this 13th day of June, 1872, ordered that the parties interested shew cause, on or before the 15th day of July next, why said sale should not be ratified and confirmed.

And no cause to the contrary having been shown, the court, on July 16, 1872, finally confirmed the sale, as follows (14–5):

Ordered, this 16th day of July, A. D. 1872, that the sale hereinbefore reported of lots Nos. 14, 15, 16, 17, 18, 19, 20, and 21 and the north 23 feet 5 inches of lot No. 13, in square No. 78, in the city of Washington, be, and the same is hereby, finally ratified and confirmed, no cause to the contrary thereof having been shown, as prescribed by the conditional order of ratification of said sale passed in this cause on the 13th day of June, 1872.

From this action of the court no appeal was ever taken or attempted.

It is undeniable that McBlair, the purchaser, never paid the trustee the two notes or either of them given in consideration for the lots, as also that the trustee never made a conveyance to McBlair; but on July 26, 1872—that is to say, ten days after the final confirmation of the sale to him—

McBlair, for the consideration of $26,521.50, or just $2,000 more than the face of his notes, conveyed the property to the District of Columbia (17–19). This consideration was paid by the District in the certain bonds authorized by the act of the Legislative Assembly of August 23, 1871 (acts of First Assembly, 1st sess., p. 117), which bore interest at seven per centum per annum, payable semi-annually on the first days of January and July. There is no dispute as to this or as to the facts that the consideration, $26,521.50, is truly expressed in the deed, and McBlair received bonds of the face value of $27,350 (16, folios 31, 32; 22, folio 45; 24, folio 48). There was, however, a contention made by McBlair that the Governor of the District, in making the transaction, guaranteed the bonds at 97 cents on the dollar (23, 24, folios 47, 48; 39, folios 185, 186); the contention of the District being, on the other hand, that the consideration was to be paid, and was paid, in the bonds "computed at ninety-seven cents on the dollar" (16, folio 32). Aside from the Governor's want of power to give the guarantee claimed, McBlair's contention is manifestly wrong and that of the District right; for on McBlair's hypothesis he would have received bonds of the face value of the purchase price, viz., $26,521.50, the value of which, at 97 cents ($26,521.50 ÷ 100 × 97), viz., $25,725.86, would have represented the actual purchase price; whereas, on the District's hypothesis, he would have received bonds of the face value of $27,341.75 ($26,521.50 ÷ 97 × 100), and in fact he received bonds of the face value of $27,350, as already stated.

These bonds thus received McBlair put upon the market and realized on them $22,700 (24, folios 48, 49; 25, folio 50). Purporting to represent those interested, McBlair then contracted with, among others, the firm of Williams and Gallant for the improvement of the dwellings on lots 8, 9, and 10, and he paid them on account the sum of $17,205 (29 *et seq.;* 30, folio 114). No pretense is made that this sum came from any other fund than the $22,700 realized on the bonds (16, folio 32; 22, folio 45); and the fact that it came

from such fund was adjudicated by the decree of August 7, 1875 (27, folio 108), to be hereafter more particularly noticed. What sums were paid out of the bonds to others for work on the dwellings does not appear by the record, for the reason that, as mentioned below, no full report was ever made of McBlair's expenditures in that behalf.

McBlair having thus expended the money received on the bonds upon the dwellings, instead of paying it to the trustee in satisfaction of his notes, the trustee, Cox, refused to make a deed of the property in question; whereupon, on June 15, 1874, the District filed a petition in the cause (aimed not at McBlair, but at the trustee), setting forth the facts in brief and praying an account of the expenditures from the proceeds of the bonds upon the dwellings; that McBlair's notes to the trustee might be cancelled as paid; that the trustee might be directed to convey to the District; and for general relief (15–17). On this petition a reference was had to the auditor of the court (19, folio 39), which was subsequently enlarged so as to embrace consideration of the subject-matter of the petition (20, folio 40).

The auditor reported July 27, 1875 (21–27). Excusing himself in that behalf on the pretense that an order by the court requiring him to report forthwith (21, folio 42) had so modified the reference as to revoke the call for the account (23, folio 46), the auditor made no report on that matter, but for the rest he reported adversely to the District, holding that the Governor had guaranteed the bonds at 97 cents, and that he had the right so to do, as the act of August 23, 1871, in respect of market-houses gave "the Governor a general plenary supervision of the enterprise, drawing upon and trusting to not only his financial judgment and wisdom, but his accomplishments in matters of architectural æsthetics." No account, however, was taken of McBlair's architectural athletics, by which the District's money got into the Gadsby dwellings; for, notwithstanding the conceded fact that the District gave and McBlair received and utilized the bonds in question and that the dwellings named in the bill got the

benefit of them, the auditor denied the District all right whatever to consideration.

To the auditor's report the District filed exceptions, which were sustained by the court on August 7, 1875, and Cox, trustee, was directed to convey to the District the premises in controversy and to surrender to McBlair his notes as paid and cancelled (27, folio 108). From this decree *McBlair alone* appealed (27, folio 109). On this appeal the court in general term, on March 4, 1876, reversed the decree of August 7, 1875, and remanded the cause to the special term for further proceedings, but (by an addendum made May 9, 1876, which was at a subsequent term of the court), without prejudice to the rights of the District to proceed in the cause or in any other suit as it might be advised (28, 29).

Thereupon, on July 14, 1876, Williams and Gallant, the contractors above mentioned, intervened by petition, reciting, (30, folio 113), that they had entered into a written contract with McBlair, "agent and attorney for the estate of said John Gadsby, deceased," to improve the dwellings; that the contract price was $18,000 and their claim for extra work $1,504.20 (making in all $19,504.20); that McBlair had paid them $17,205, leaving a balance of $2,299.20, and claiming that their work was done with the knowledge of parties interested. Wherefore they prayed that John C. Harkness, who had been appointed in supposed succession to the trustees named in Gadsby's will, might be directed to pay them the sum aforesaid out of moneys in his hands as such trustee (29–32).

They subsequently, on April 24, 1877, filed an amended petition (40–42), but not until after the auditor had reported, which he did on March 16, 1877 (36, 37), and Harkness had filed exceptions to the report, which he did on April 7, 1877 (40). The auditor's report was in favor of Williams and Gallant, to the amount of $2,050.70.

To this proceeding the District of Columbia was not made party. On December 13, 1877, the court, ignoring the amended petition, affirmed the report of the auditor as to the amount

found due, but proceeded to decree as follows: Declaring the sum so found to be a lien on the proceeds of the lots sold; directing Cox, trustee, to proceed to collect from the "purchaser or purchasers" of the lots the purchase-money and pay said sum; instructing him, if the purchase-money were not paid, to advertise and sell the lots, under the original decree, at the cost and risk of said "purchaser or purchasers," and, if "said purchase-money" should not be sufficient for the purpose, directing Harkness to pay the sum found due out of any moneys in or coming into his hands as trustee (43, 44).

On February 20, 1880, Cox, trustee, having qualified as a justice of the court, resigned as trustee, and one Miller was appointed in his place, subject to the directions of the decree of December 13, 1877, just mentioned (44, 45). He received of Cox McBlair's two notes (46, folio 289), and on June 1, 1880, he was directed to readvertise and sell the lots at McBlair's cost and risk (46, folio 290). From this order the District of Columbia appealed (47, folio 292).

No sale was made, however, and on December 27, 1880, Williams and Gallant, *again ignoring the District of Columbia*, filed a new petition (48–56), on which decrees in special and general term were, respectively, made, directing Harkness to pay the sum of $2,050.70 (56, 57), which he did, and the claim of Williams and Gallant was entered satisfied July 16, 1881 (57, 58). This last proceeding wholly ignored the fact that appeals were still pending from the decree of June 1, 1880 (47).

These appeals having been thus ignored, and, probably, having fallen from the calendar through oversight, the District, on November 19, 1885, ordered its appeal on the calendar (58, folio 320). This appeal came on for hearing February 1, 1887, and the decree of June 1, 1880, was affirmed, the trustee (Miller) being again directed to readvertise and sell at McBlair's cost and risk (58, 59). The District of Columbia appealed to this court (*ibid.*).

II.

Assignment of Errors.

The court below erred—

1. In reversing the decree of August 7, 1875, which directed Cox, trustee, to execute and deliver a conveyance to the District of Columbia of the premises in controversy.

2. In holding that the District of Columbia is not entitled to the premises in controversy.

3. In directing a resale of the premises in controversy.

4. In passing the decree of June 1, 1880, directing a resale of the premises in controversy.

5. In passing the decree of February 1, 1887, affirming the decree of June 1, 1880.

6. In holding, in effect, by the several decrees complained of, that the sale to J. H. McBlair was not consummated, and that all the right, title, and interest of said McBlair and of all the parties to the cause have not passed to and vested in the District of Columbia.

III.

Argument.

A.

The proceedings in the cause fall naturally into two parts, the first ending with the final confirmation of the sale to McBlair on July 16, 1872 (14 and 15), and the second consisting of all the subsequent proceedings.

1. *The decrees of May* 10, 1869, *and July* 16, 1872, *respectively directing and confirming the sale, are conclusive in this cause upon all parties.*

a. Neither of these decrees was appealed from, and, no matter what criticism may be visited upon either court or counsel in respect of the various proceedings leading up to them, the decrees themselves are not open to assault in this cause. The court below persistently recognized this in its subsequent decrees directing the successive trustees to proceed to collect the purchase-money and ordering a resale only in default of success in that behalf, which resale was to be at the risk of McBlair, the purchaser, thus recognizing his continued obligation under the sale. Any error in the two decrees under consideration, if any, is now remediable only by bill of review or analogous proceeding. This proposition is elementary, and would only be weakened by amplification.

b. The inquiry then arises, What is the effect of these decrees?

(1.) The decree for sale directs the trustee to make the sale either "at public auction or at private sale, as he may find most expedient." No terms are prescribed for the sale if private, and, in the nature of the case, none would be, because if an intending purchaser were ready to buy on prescribed terms he would buy and would have to buy at the public auction for which the terms were prescribed; but for the sale, if made at public auction, certain terms were prescribed, viz., one-third cash and the residue in six and twelve months, with interest. That the distinction here made is correct is conclusively established by the fact that the sale to McBlair, which was private, was wholly on credit (of three and six months), and was confirmed by the court without objection by any one.

And this distinction holds throughout the decree. The provisions for reservation of a lien for the deferred pay-

ments and for a conveyance by the trustee on ratification of the sale and full payment of the purchase-money are confined to the case of a public sale. This is demonstrated by the language of the decree, which, as to these provisions, speaks of "such sale," (meaning thereby the sort of sale last mentioned, to wit, at public auction); whereas, as to the trustee's report, the expression is "*any* such sale," (meaning thereby either sort of sale mentioned in the decree).

(2.) The trustee having sold at private sale and the court having confirmed the sale reported by him, the result was to divest the right, title, and interest of the parties to the cause and to vest the same in McBlair without any conveyance by the trustee.

What is now section 793, R. S. D. C., is, with slight changes of phraseology, section 21 of the act of Congress of February 22, 1867, amending the law of the District of Columbia in relation to judicial proceedings therein (14 Stat., 406), as follows:

That in case of the sale of things, real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title, or interest out of the former owner, party to the suit, and vest it in the purchaser, *without any conveyance by the officer or agent of the court conducting the sale;* and of this transfer of title the decree shall be notice to all the world, when a copy thereof shall be registered among the land records of the District. Nevertheless, the court may order its officer or agent aforesaid to make a conveyance, if that mode be deemed preferable, *in particular cases.*

The only order for conveyance that can be claimed to exist is that already noticed in the decree *of sale*, which, however, as above shown, had reference only to a public sale; but even if it were intended to have reference to a private sale it is not the order contemplated by the act and cannot defeat the clear mandate of the law passing the title. The order intended by the act was, first, to be determined by the court as *preferable* in the particular case, and, secondly, to

be made on the *confirmation* of the sale. Manifestly, the determination of the court as to mode of conveyance is to be reached only on consideration of the accomplished sale.

If this view be correct the title became vested in McBlair on July 16, 1872, and when, on July 26, 1872, he made his deed to the District (which is with both special and general warranty and covenant for further assurance), the title passed to the District. What we may think of the improvidence of the court in selling on credit is wholly beside the question; the point is that we have a transfer of title under such circumstances that *in this cause* and on the existing record no assault can be made upon it.

2. Regarding now the proceedings since the confirmation of the sale, the petition of the District of Columbia set out, in short, that it had bought McBlair's interest—had paid him for it—and the consideration of its purchase, though it had not passed through the trustee's hands, had yet gone to accomplish the object of the bill and the decree of sale.

That McBlair received the bonds, realized on them, and spent their proceeds is incontestable. He gave his solemn deed in return and no question of its validity or sufficiency was involved on the District's petition. In this matter McBlair had no interest whatever. The District's object was solely to get a conveyance from the trustee, deemed necessary by the District's adviser at the time.

The court granted the prayer of the petition. The decree of August 7, 1875, directed the trustee, Cox, to convey to the District, as McBlair had already done, and that McBlair's notes be surrendered to him as cancelled. From this decree *McBlair alone* appealed. The decree stands, therefore, as final and conclusive against all the other parties. The rule is well known, and is thus clearly stated by Daniell (Ch. Pl. and Pr., 1485):

"All parties interested in supporting the decree or order appealed from are entitled to be heard; but no party, except the appellant, can be heard in support of the appeal. If,

therefore, any party who is not included as a copetitioner in a rehearing is desirous of appealing he must present a separate petition; otherwise he will be precluded from all benefit of the appeal, *even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant.*"

The rule has been repeatedly recognized and applied in Maryland.

On an appeal from chancery the appellate court decrees only in relation to the rights of those who are parties to the appeal.

Leadenham *vs.* Nicholson, 1 H. and G., 267.

And only as to those parts of the decree below which are complained of.

Sand *vs.* Codwise, 4 Johns. (N. Y.), p. 602.

"The decrees of a court of chancery frequently have various aspects and bearings, affecting variously the different parties to the suit. A party aggrieved by one branch of a decree does not thereby acquire a right to call in question another portion of the decree which has no bearing or effect upon his rights and interest. He can appeal only from such parts of the decree as affect him."

Idley *vs.* Bowen, 11 Wend. (N. Y.), p. 238.
And see Dan. Ch. Pl. and Pr., 1489, and N. (3).

If it does not appear by the record that the party appealing has rights which have been injured by the decision below, such decision will not be reversed, though it is erroneous as to other parties.

Pratt *vs.* Johnson, 6 Md., 397.

Where a party does not appeal from a decree the appellate court cannot reverse it for his benefit upon an appeal by other parties.

Lanahan *vs.* Latrobe, 7 Md., 268.

And see, generally—

Chittenden *vs.* Brewster, 2 Wall., 196.
The Quickstep, 9 Wall., 672.
The Stephen Morgan, 94 U. S., 599.
Loudoun *vs.* Taxing District, 104 U. S., 771, and cases severally cited.

As to one other important feature of the case all parties are concluded—that is, that fact that J. H. McBlair was the duly constituted agent of the parties interested in both the dwellings and the unimproved lots sold to improve them. The conclusion of all parties as to this is established beyond question. McBlair held himself out as such agent; he was dealt with as such by Williams & Gallant, whose claim would have been worthless had he not been such agent. The court below sustained their claim, which it could have done only by adjudging him such agent, and by order of the court they were paid by Harkness, trustee, out of the revenues of the estate. From the orders and decrees of the court working out this result there has been and is no appeal.

Mr. McBlair is thus left the only antagonist of the District.

And as to this the case is not affected by the decree of the general term of March 4, 1876, reversing that of August 7, 1875. The decree of the general term recites that it is made "upon the appeal of J. H. McBlair," and, of course, the reversal is as to him only. The other parties were not before the court; they and their rights had stopped at the court below. This is borne out by the subsequent decrees already mentioned, which directed a resale at his cost, showing that from the time of confirmation of the sale to McBlair the court was dealing with him only, and in respect of consummation of that sale.

Nor is the case made different by the decree of June 1, 1880, again ordering a resale at the cost and risk of McBlair. Although a number of the parties (including McBlair) besides the District appealed from this decree, no one except

McBlair and the District had any interest in appealing. McBlair is interested presumably in trying to hold his purchase, the District to get what it has long since paid for. As the decree of 1880 is, in effect, in favor of everybody but these two, the appeals of the others are wholly without intelligence.

As concerns McBlair, the situation reduces itself to this: The court in 1875 directed the trustees to convey to the District and to surrender to McBlair his notes. McBlair, of all parties the least entitled to complain of this, appealed; while all the others, more concerned than he, acquiesced. In 1876, notwithstanding that for three years and more, on his own hypothesis, he had not complied with the terms of sale, and that by the decree he was wholly exempted from liability so to do, he procured the court to reverse the decree. Then, in 1880, because the court proceeded to do the only thing which, as to him, it could do in the situation into which he had brought the case, he again appealed.

Considering, then, this second branch of the case, we have on the record this incontrovertible condition of things:

The lots in question were ordered sold in May, 1869; they were sold to McBlair in June, 1872; this sale was ratified and confirmed in July, 1872; and no appeal was taken or can now be taken from any of the decrees down to this point. From this point on all that the beneficiaries of these proceedings could be concerned with was the consummation of the sale and the due application of the proceeds to the purposes in view in ordering the sale.

In July, 1872, McBlair sold and conveyed all his rights to the District of Columbia; the District paid the agreed price; that price was received by McBlair and applied to the purposes set out in the bill, and his actions in the premises were had in the name and to the advantage of those entitled to the benefits of the sale, as is conclusively adjudicated by the court in its recognition of the claims of Wil-

liams and Gallant. From this point on, it being thus substantially adjudged that the sale ordered by the court was in effect consummated, the question becomes simply who in equity is to be deemed the purchaser.

The petition of the District and the testimony in its support in effect show this condition of fact and law:

The object of the bill was to make the unimproved lots pay for the improvements to the dwellings. The lots were sold technically to J. H. McBlair, substantially to the District. Instead of passing through the hands of the trustee, the purchase-money passed through the hands of McBlair—as much the representative of the parties as the trustee would have been—into the dwellings. If the court is satisfied, as it must be, that the application was in fact made, this application is in equity to be considered as though made by the court through its trustee. Now, inasmuch as the parties entitled under the will of Gadsby waived the formal substitution of a new trustee to act under the will; and, inasmuch as all they asked of the court is in effect attained, both they and the court should have stood by their action and give the District the benefit of what it paid and the consideration of such payment.

The decree of August 7, 1875, adopted the view set out in the petition. It in effect declared that the terms of sale were substantially complied with and the object of the bill attained. The parties entitled under the will of Gadsby had got all that they asked for, the improvement of the dwellings at the cost of the lots. Consistently enough, they did not appeal from the decree declaring this fact.

The decree further held in effect that McBlair had no right to complain, and small wonder, for the court had before it his deed to the District, whereby he conveyed the premises, describing them by square and lot, and, further, as "being the same real estate which was sold by one Walter S. Cox, trustee, to the said John H. McBlair by virtue of a decree made by the supreme court of the District of Columbia,

made in the cause of McBlair *et al. vs.* McBlair *et al.*, No. 1355, equity docket 9, and dated May 10th, A. D. 1869," and granting "all the estate, right, title, interest, claim, and demand whatsoever, at law or in equity," that he had in the premises; and wherein he covenanted "that the said parcels of land and appurtenances are free and clear of all incumbrances whatsoever," and that he and his heirs "shall and will warrant and forever defend the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, from and against him, the said John H. McBlair, and his heirs, *and against all and every other person and persons whomsoever lawfully claiming or to claim the same or any part or parcel thereof;*" not to add the covenant for further assurance, which, in a sense, he faithfully observes to this day.

This more than usually solemn instrument still faces him in all its vigor. He has never asked that it be reformed for error or cancelled for fraud. It estops him. He got quite as much as he had a right to hope for when the decree further provided that his notes should be canceled and delivered up to him as paid.

This decree of August 7, 1875, was sound in principle and righteous in result, and it should have been sustained. The only party who could claim not to have been finally concluded by it is McBlair, and he was as much concluded in fact as all the others were in law. How was he aggrieved by it, and what possible ground of complaint had he?

More than this, in law he ought never to have been heard on his appeal. *He is not a party to the cause, either originally or by virtue of any proceeding since taken. He has never intervened by petition, and no rule or order of the court has ever admitted him as a party or ever been addressed to him, so that, in response thereto, he might have introduced himself into the cause.*

As the parties entitled realized the benefits sought by the bill; as they acquiesced in the decree declaring the District's right to a conveyance; and as McBlair is estopped by his deed and had no right to be heard, either in fact or in law,

(2.) There was nothing in the decree of the special term of which McBlair could complain, for it adjudicated nothing against him. He had not paid or offered to pay his notes, then long overdue, and the adjudication that they should be delivered up as though paid was in his favor. The parties really affected by this decree were the trustee and the parties to the cause, none of whom appealed.

(3.) The decree of the general term, in effect, adjudicated nothing against the District. It merely remanded the cause "to be further proceeded with as the parties may be advised." If this means anything it means the same as "without prejudice." In the course of further proceedings the court ordered a resale three several times. The District being in possession of the property would, if it had been touched by any of these orders, have had the option to appeal from each of them as made or await the consummation of one of them before appealing. In fact, it was affected by only the last order to resell, and then it appealed, and on this appeal the general term, *for the first time when the District was before it*, directed a resale. From this action, the first of which it could properly complain, it appealed to this court.

This appeal brings up the District's whole case. Until the order of June 1, 1880, the District was not affected by the proceedings after March 4, 1876. Until June 1, 1880, its possession or rights in the premises were not legally threatened, and at this first danger it promptly appealed. The action of the court below on that appeal is now brought under review here. Clearly its standing before the court cannot be impeached.

(4.) On the other hand, however, as has already been more than once pointed out (and it cannot be too repeatedly urged upon the court), there is no one here with a standing to oppose the District. McBlair is not here, for he was never made party to the cause, either originally or by any proceeding in the course of the litigation. He never even attempted

to maintain his purchase. But if he was before the court below the decree appealed from by the District was against him, and he has not appealed. And the parties to the cause not having appealed therefrom are concluded by the decree of August 7, 1875.

HENRY E. DAVIS,
For the Appellant.

124-1

In the Supreme Court of the United States.

No. 1329. October Term, 1887.

THE DISTRICT OF COLUMBIA, Appellant,

vs.

AUGUSTA McBLAIR ET AL, Appellees.

BRIEF FOR APPELLEES.

J. J. DARLINGTON.

Solicitor for Appellees.

CYRUS S. KING, 1127 Tenth Street, N. W., Printer. Legal printing A SPECIALTY.

In the Supreme Court of the United States.

October Term, 1887.

No. 1329.

THE DISTRICT OF COLUMBIA, *Appellant,*

vs.

AUGUSTA MCBLAIR ET AL., *Appellees.*

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEES.

THE following summary of the Record will, it is believed, furnish the clearest statement of the case to the Court, and at the same time prove a convincing argument on behalf of the Appellees.

The Bill was filed July 30th, 1868, by Augusta McBlair and Julia Ten Eyck, by William H. Philp, next friend, against the children of the Complainants, of whom C. Ridgely and A. Jackson McBlair and Jane, May and John C. Ten Eyck were minors, and against Margaret S. Chapman, and the heirs of Sophia Newton, descendants and, with the heirs of William Gadsby who are named in but not made parties to the Bill, the heirs-at-law of John Gadsby, who died in 1844; and, also, against the heirs of Alexander McIntyre, deceased, the last surviving trustee under the Will of the said John Gadsby. It alleges that the testator, by his Will, devised Lots 8 to 19 inclusive, in Square No. 78, in the City of Washington, for the separate use of the Complainants, in equal moieties, for life, with remainder in equal moieties to their children in fee simple, and, if either died childless, the whole to go to the children of the other, but with no provision for the contingency of both dying without children;

that three of the lots were improved by substantial brick dwellings, the others being unimproved except by out-buildings; that if the houses were properly improved and modernized, they would yield a good revenue, which would enure to the benefit of all interested, but they were old-fashioned, without modern conveniences, and much out of repair; that the income was inadequate to the support of the Complainants, who had not the means to make the proposed improvements, and were, moreover, burdened by the taxes on the vacant lots; that it would be for the advantage of all parties to sell the vacant lots and apply the proceeds to improvement of the dwellings; and that Complainants could only have relief in Equity pursuant to the Act of Congress of Aug. 18, 1856, entitled An Act to authorize the Circuit Court of the District of Columbia to decree sale of real estate in certain cases. Prays process, sale of the vacant lots for the object aforesaid, and for general relief.

The Act in question will be found in 11 Stats. at Large, p. 118, and is as follows:

"Be it enacted by the Senate and House of Representa-
"tives of the United States of America in Congress assem-
"bled, That in all cases in which real estate within the Dis-
"trict of Columbia shall have been limited heretofore, or
"shall be limited hereafter, by the provisions of any Deed
"or Will to one or more, for life or lives, with a contingent
"limitation over to such issue of one or more of the tenants
"for life as shall be living at the death of their parent or
"parents, and the said Deed or Will containing the limita-
"tion shall not prohibit a sale, the Circuit Court for the
"District of Columbia, upon the application of the tenants
"for life, shall have power to decree a sale of such real
"estate, if, upon the proofs, it shall be of opinion that it
"is expedient to do so, and to decree to the purchaser an
"absolute and complete title in fee simple.

"SEC. 2. And be it further enacted, That application for
"the sale of such real estate shall be by Bill in Equity,
"verified by the oath or oaths of the party or parties, in
"which all the facts shall be distinctly set forth, upon the
"existence of which it is claimed to be expedient that such
"sale should be decreed: which facts shall be proved by

"competent testimony. Such of the issue contemplated by "the limitation as shall be in existence at the time of appli- "cation for the sale of such real estate, shall be made parties "defendant to the Bill, and if minors, by guardian *ad litem*, "together with all who would take the estate in case the "limitation over should never vest. Such of the parties "defendant as shall be of the age of fourteen years or more "shall answer in proper person, on oath, and all evidence "shall be taken upon notice to the parties and to the guard- "ian *ad litem*.

"SEC. 3. And be it further enacted, That the proceeds "of the sale of such real estate shall be held under the con- "trol and subject to the order of the Court, and shall be "vested under its order and supervision, upon real and per- "sonal security, or in government securities, and the same "shall, to all intents and purposes, be deemed real estate, "and stand in the place of the real estate from the sale of "which such proceeds have arisen, and as such real estate, "be subject to the limitations of the Deed or Will.

"This Act shall be in force from its passage."

Sundry orders for the appearance of the numerous non-resident defendants, including all the children of Mrs. Ten Eyck, were obtained, but, so far as the Record shows, no publication as to any of them was made.

November 18th, 1868, a commission was issued to three persons to take the answer of John C. Ten Eyck, Jr., one of the three infant Ten Eyck defendants, by guardian "to be by them appointed," his infant sister, Jane Ten Eyck, being one of the commissioners appointed for this purpose. No steps of any kind were taken for appointment of a guardian *ad litem* for Jane herself, nor for May Ten Eyck, also an infant. On November 30th, 1868, however, an unsworn answer purporting to be signed by them and the two adult Ten Eyck defendants was filed, admitting facts stated as to the title to the lots in question, and that they believe it to advantage of all parties interested that the vacant lots be sold and the proceeds re-invested either in the manner mentioned in the Bill or in some good securities, yielding an income, and consenting "to such sale for said object."

December 9, 1868, five of the six McBlair children, in-

cluding one of the infants, answered as follows: "These respondents saving and reserving, &c., admit the facts stated in said Bill, and consent to a sale of the property described in it as therein prayed." No answer by or on behalf of the remaining infant, A. Jackson McBlair, appears to have been filed.

The children of William Gadsby, a deceased son of the testator, appear to have been served with process, but were not made parties by the Bill, and did not appear or answer. The proceedings, also, show neither service of process nor publication against Margaret S. Chapman, a daughter of the testator, nor any appearance or answer by her or on her behalf.

May 4th, 1869, the cause was referred to a Special Auditor to inquire and report whether it would be expedient and for the benefit of all parties interested to sell, and to grant the prayer of the Bill as to application of the proceeds.

May 8th, 1869, the Auditor's Report was filed, accompanied by the deposition of the *husband of the Complainant Augusta McBlair*, which was the *only testimony taken.* This deposition, taken May 7th, 1869, states that Charles Ridgely and A. Jackson McBlair, and Jane, May, and John C. Ten Eyck were minors; that *besides the lots named in the Bill, Lots 20 and 21 were included in the trusts of John Gadsby's Will;* that the houses were dilapidated, and the Complainants without means to make them tenantable; that four of the six houses yielded a rental of $1,800, a fifth being vacant, and the sixth being occupied by the witness' family; that, if repaired, they would bring $4,000 more; that the portion prayed to be sold was worth about $10,000, and that, in the opinion of the witness, and of the parties, and of all the business men with whom he had conversed, it would be for the interest and advantage of all concerned that the unimproved part of the property should be sold and the proceeds applied to improvement of the dwelling-houses. And thereupon, the Auditor, referring to the deposition of this witness, reports: "From his statement, and from my own personal knowledge of the property, I have no hesitation in saying that the disposition of the property in the manner sought by the Bill would not only be for the interest and advantage of all parties concerned, *but would also enure to the improve-*

ment of the neighborhood in which it is located. It is therefore recommended that the prayer of the Bill be granted."

Thereupon, on the 10th day of May, 1869, a decree was passed reciting that the cause came on to be heard upon the Auditor's Report, and decreeing that "the property described in the Bill *and the Auditor's Report and deposition returned by him*" be sold, appointing a trustee with power to sell at either public or private sale, prescribing that the terms of sale should be, one-third of the purchase money in cash and the residue in two equal instalments at six and twelve months after date with interest, to be secured by approved notes and a lien reserved, and directing that on the ratification of the sale, and full payment of the purchase money, the trustee should convey to the purchaser, and should bring into Court the proceeds of sale *to abide its future order in the premises.*

June 13th, 1872, the trustee reported that he had sold "the lots of ground described in the Bill, being lots Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, and Twenty-one, and the north twenty-three feet five inches of Lot Thirteen," to J. H. McBlair, husband of the Complainant Augusta McBlair, for $24,521.50, for which sum the said McBlair had given his two promissory notes, each for $12,260.75, at three and six months, respectively, with interest.

On the same day, June 13th, 1872, ordered that the parties interested show cause "on or before the 15th day of July next, why said sale should not be ratified and confirmed." No publication of this order *nisi* was made, or other notice given to the parties in interest.

Ordered, July 16th, 1872, that the sale of Lots 14, 15, 16, 17, 18, 19, *20 and 21*, and the north 23 feet and 5 inches of Lot 13, Square 78, be finally ratified and confirmed, no cause to the contrary being shown as prescribed by the conditional order of ratification passed June 13th, 1872. No publication of the order *nisi* appears to have been made.

June 15th, 1874, the District of Columbia filed a petition in the cause, stating that Henry D. Cooke, Governor, bought Lots 14 to 21 and part Lot 13, and received a Deed therefor from John H. McBlair and wife, with covenant of general warranty from him, the expressed consideration being $26,-

521.50, paid in Market Stock Bonds of the District of Columbia computed at ninety-seven cents on the dollar, their face value being $27,350; that the trustee knew McBlair was negotiating such sale to the District, and expected him to assign his purchase to the District, and have the latter make payment directly to said trustee; that the payment was received by McBlair without the trustee's knowledge or concurrence, and the money expended upon repair of the buildings; that, "regularly, said McBlair ought to have paid the amount "of his notes to the trustee, in order that the money should "be disbursed under direction of the Court, without which "payment his title to the said property did not become tech-"nically complete, and said trustee could not convey to "him," but that the object of the Bill was to have the proceeds applied precisely as they were applied, namely, toward improvement of the buildings; that McBlair's notes to the trustee were thus virtually paid, and the property sold should therefore be conveyed to the District, to which end it prays that an account be taken of the expenditures from the proceeds of the bonds upon the buildings, that McBlair's notes be canceled as paid, that a conveyance by the trustee to the District be decreed, and for general relief.

An order was passed on the same day, June 15th, 1874, referring the cause to the Auditor for the purpose, as finally fixed by several stipulations and modifying orders, of reporting his conclusions in respect of the subject matter of the petition; and July 27th, 1875, he filed his report, finding the following facts:

1. That Gov. Cooke, on behalf of the District, agreed to pay $26,521.50 *in cash* for the property, the excess of which sum over the price to be paid the trustee was to go to McBlair as a profit.

2. That, being unable to pay in cash as per the contract, Gov. Cooke paid in Market Stock Bonds, with a guaranty that they should bring in the market not less than ninety-seven cents on the dollar, and thus realize the contract price.

3. That this guaranty was not fulfilled, and that the

proceeds of the bonds fell short of the contract price some $4,000 or more.

4. That the prayer for conveyance of the premises to the District should be denied.

Decree August 7th, 1875, sustaining exceptions to the Auditor's Report, directing the trustee to convey to the District, decreeing cancellation of the purchase money notes and their surrender to Mr. McBlair, and fixing amount of bond for appeal to the General Term.

Decree of the General Term, February 4, 1876, "that the said decree of the Special Term be, and the same hereby is, reversed, with costs," and that the cause be remanded to the Special Term to be further proceeded with as the parties might be advised; and (by an *addendum* of May 9th, 1876) "without prejudice to the right of the Defendant the District of Columbia to proceed in this or any other suit as it may be advised or entitled to."

The original decree, it will be observed, was passed February 4, or at the January Term of the Court, while the addendum was assumed to be made May 9th, at the April Term.

On the 14th day of July, 1876, Williams and Gallant, builders, filed a petition in the cause, alleging that they had expended labor and materials to the amount of $19,504.20 in the repair and improvement of the buildings in question, under a contract with John H. McBlair, of which amount $2,299.20, with interest from April 30, 1873, remained unpaid, and praying that John C. Harkness, who had been appointed trustee of the estate, and whom the petition alleges to have received from the trustee who made the sale, the proceeds of the lots sold, might be decreed to pay that sum to the petitioners.

After sundry proceeding under the above petition, not material for present purposes, the Court, on the 13th day of December, 1877, passed a decree directing the trustee who made the sales to proceed to collect the purchase money, and in default thereof to re-sell the lots, and out of the proceeds to pay to petitioners $2,050.70 with interest and costs. The appeal taken from this decree by the trustee Harkness was

dismissed for failure to file a printed brief. The District of Columbia did not appeal.

On the 20th day of February, 1880, the trustee who made the sales resigned, and, on the same day, William J. Miller, Esq., was appointed trustee in his stead, and directed to perform the duties imposed upon his predecessor by the decree of December 13th, 1877. No appeal was taken by any one from this order.

On the 24th day of May, 1880, Mr. Miller reported that he had offered to re-sell the lots at public auction, but had received no bid therefor, and, also, that Messrs. Jacob H. Kengla and Joseph Libby had made an offer of $21,000 for them at private sale, conditioned upon a good title being given. Thereupon the Court passed the following order:

"*This cause coming on to be heard on the report of William J. Miller, trustee, filed in the above entitled cause, and the same having been argued by Martin F. Morris, solicitor for Williams and Gallant, Francis Miller, solicitor for the District of Columbia, and E. C Ingersoll, solicitor on behalf of said McBlair and Ten Eyck, and duly submitted to and considered by the Court, it is this first day of June, A. D.* 1880, *ordered, adjudged and decreed that said trustee proceed to re-advertise and sell the real estate heretofore sold to John H. McBlair at the risk and cost of the said John H. McBlair, the defaulting purchaser; and further that the offer of said Jacob H. Kengla and Joseph Libby be and the same is hereby rejected.*"

The argument on behalf of the District of Columbia noted in this order, and its appeal from it, which is the basis of the present appeal to this Court, are the only steps taken by or on behalf of the District since the decree of February 4th, 1876, reversing the decree which directed a conveyance in its favor. An appeal from the above order of June 1, 1880, was also taken on behalf of the McBlair and Ten Eyck children, but not brought to hearing, and the appeal of the District was not prosecuted for six years thereafter.

The trustee again offered the property for sale, without result; and on the 27th day of December, 1880, Williams and Gallant filed a new petition setting forth that their for-

mer application to the Court was based upon the erroneous impression that the sales had been validly effected, for the purpose of making the improvements, and that the proceeds were in the possession of the trustee; that they have since learned that the purchase money was not paid, and, further, that both for want of jurisdiction in the Court and by reason of great irregularities in the proceedings, it was utterly impossible to effect a valid sale of the property from the proceeds of which their claim could be paid; that they had nevertheless greatly improved the property, and that the trustee, by reason thereof, was, and for a number of years had been, receiving a largely increased revenue from it, wherefore they prayed a decree directing the payment of their claim from the general funds of John Gadsby's estate in the hands of the trustee.

Upon this petition, after sundry proceedings thereunder, in which the District took no part, the trustee was ordered to pay the claim of Williams and Gallant out of funds in his hands belonging to the estate of John Gadsby, in no way connected with the lots or transactions in question, and finally did so on the 15th day of July, 1881.

Points and Authorities.

From the foregoing summary of the proceedings, it is apparent.

I. That the cause is *res adjudicata* as against the present Appellant, the District of Columbia, upon the record as it stands.

II. That, if it were competent to hear the cause *de novo*, no other decision of it than that of the General Term embodied in its decree of February 4th, 1876, would be possible.

I.

The intervention of the District of Columbia in this cause, and its standing as a party to it, rests wholly upon its petition of June 15th, 1874.

That petition rests solely upon the claim that the expenditure by Mr. McBlair of the proceeds of the bonds toward repair and improvement of the buildings, though without

authority from any one, and in the face of the decree of the Court which directed the proceeds of the lots sold to be brought into Court, to abide its future order, was nevertheless virtual payment by him of the purchase money for those lots, and that the District, as his assignee, was entitled to have the lots conveyed to it.

Such being the sole status of the District in the cause, the decree of the General Term of February 4th, 1876, reversing the decree of the Special Term which directed such conveyance, was final as to the District of Columbia. The remanding of the cause to the Special Term "to be further proceeded with as the parties might be advised," could have no reference to the District, whose very standing as a party was eliminated by the direct and unqualified repudiation and denial of the only equity or claim asserted on its behalf.

No appeal from this decree was taken.

Three months later the District, it is true, obtained the addendum to this decree, "without prejudice to the right of the Defendant the District of Columbia to proceed in this or any other cause as it may be advised or entitled to." But except as showing that the District itself well understood that the decree as originally passed was final, this addendum is wholly without significance. Being made at a subsequent term of the Court, it is an absolute nullity.—Phillips *vs.* Negley, 117, U. S., 665; Barrell *vs.* Tilton, 119, U. S., 637, 643.

That the term was a subsequent one will appear from inspection of the rules of the Supreme Court of the District of Columbia, of which this Court will take judicial notice (see 109 U. S., p. 156), and is moreover expressly conceded in the Brief of the Appellant.

That without the addendum the decree was, as to the District of Columbia, final, will probably not be questioned. It denied all that the District asked. It left the parties to the suit to proceed to collect the purchase money of the lots sold, or to seek recovery of the lots themselves, as they might elect; but that the District was not entitled to a conveyance of the property, the only thing it claimed, was determined.

The decree in question denied the proposition of the Appellant's petition that repair of the houses by McBlair, upon

his own responsibility and according to his own plans, without the authority, the consent, or the supervision of the Court, and without the knowledge and against the known wishes of half if not of all the parties in interest (see his deposition, at pp. 37-8 of the printed Record), was payment for the lots sold, or sufficient to entitle the District, as his assignee, to a conveyance of those lots. It followed, necessarily, that the lots remained unpaid for, and that the purchaser was in default.

The Special Term so construed the finding of the Court, and by decree of December 13th, 1877, from which the District did not appeal, directed the trustee to re-sell at the defaulting purchaser's risk.

On the 20th of February, 1880, the Special Term, by an order which also was not appealed from, again directed a resale at the risk of the defaulting purchaser.

And it was not until July 1, 1880, after the expiration of more than twice the period allowed for appeal to the Supreme Court of the United States from the decree of February 4th, 1876, that a simple order denying an application to purchase privately, and directing the trustee to again offer the property at public sale, was availed of as a pretext to have the General Term again hear a cause which it had already heard and decided, upon precisely the same pleadings and the same evidence which were presented to it then.

Not only so, but hearing upon the appeal was kept back for six years more, until the order appealed from had lost its force by the substitution of a new decree therefor, and full performance and satisfaction thereof.

To apply the test of finality laid down by this Court in Bostwick *vs.* Brinkerhoff, 106 U. S., 3, and in Benjamin's Heirs *vs.* Dubois, 118 U. S., 46, 48, the decree of February 4th, 1876, was one which, so far as the District was concerned, "terminated the litigation between the parties on the merits of the case." The right of the District to the only relief it asked was no longer open for litigation. The conveyance sought was denied.

Indeed, it is only in the light of that decree that the decree now ostensibly appealed from can be regarded as final. The latter merely affirms the order of the Special Term, passed June 1st, 1880, directing the trustee to "proceed to re-

advertise and sell the real estate heretofore sold to John H. McBlair, at the risk and cost of the said John H. McBlair, the defaulting purchaser." Viewed alone, this order has no element of finality about it.—Butterfield *vs.* Usher, 91 U. S., 246. It is the decree of February 4th, 1876, denying the Appellant's right to a conveyance of the property, which is final, and from which it is sought indirectly to have the benefit of an appeal more than ten years after it was passed.

Upon these facts and considerations, it is submitted that the cause is *res adjudicata* so far as the District is concerned, and that the appeal brings up nothing for the Court to consider.

II.

But, in the second place, if the cause could be heard *de novo* upon the merits, no other decision than that arrived at by the General Term in its decree of February 4th, 1876, would be possible.

In the first place, we are met at the threshold with the insuperable objection that the Act of Congress not only affords no warrant for expenditure of the proceeds of sale in repairing the old buildings, but expressly prohibits it. It provides, in terms, that the proceeds of sale "SHALL BE HELD UNDER THE CONTROL AND SUBJECT TO THE ORDER OF THE COURT, AND SHALL BE VESTED, UNDER ITS ORDER AND SUPERVISION, UPON REAL OR PERSONAL SECURITY, OR IN GOVERNMENT SECURITIES."

The word "vested," in this connection, means "invested."—Thaw *vs.* Ritchie, 5 Mackey's R., p. 215.

In the second place, neither the Court, nor any of the parties in interest except the life-tenants, ever sanctioned or gave assent to the application of the proceeds of sale to the purpose proposed. The Ten Eycks, three of whom were infants, in their answer, state that a sale of the unimproved property, and the investment of the proceeds in the manner proposed, "OR IN SOME GOOD SECURITIES YIELDING AN INCOME," would be advantageous to the parties in interest; and they thereupon consent to the sale, leaving the application of the proceeds a question to be thereafter determined. The McBlair children, two of whom were also infants, by their

answer consent only "to *a sale* of the property described." And the Court, in its decree for sale, expressly directs the trustee to "bring into Court the proceeds of sale, to abide its future order in the premises," obviously reserving the question of the disposition to be made of them for future consideration and decision.

Neither the Court nor any of the parties in interest, therefore, were committed to the scheme of expending the proceeds of sale in improving the old buildings, except the life tenants, who filed the Bill, and whose interests, no doubt, would have been thereby promoted. Not only so, but Mr. McBlair, in his deposition above referred to, declares that he expended the money he realized from the bonds in the way he did, without authority and upon his own responsibility, because he knew that if the Ten Eycks knew of it they would oppose it.

Either one of the two propositions above stated, and the truth of which is apparent from the Record, namely, that the application of the proceeds of the sale to repair of the old houses was neither authorized nor permissible under the Act, and that neither the Court nor any of the parties except the life-tenants authorized or assented to such application, is sufficient to strike out the only equity set out in the District's petition, viz., that the object of the bill was to have the proceeds of sale applied precisely as they were applied, to wit, to the improvement of the buildings, and that McBlair's notes for the purchase money were thus virtually paid by him. Other objections, however, abound. Thus,

1. The Act provides that all who would take the estate in case the limitation over should never vest should be made parties Defendant; while the record shows that heirs representing two-fifths of the estate were either not made parties at all, or not served with process.

2. Five of the eleven remaindermen were infants, no one of whom was brought before the Court either in accordance with the terms of the Act or with the general rules governing the practice of Courts of Chancery, in such way as to be bound by the proceedings.

3. The Act authorizes the Court to decree sale only after the facts relied upon to establish its expediency have been "proved by competent testimony;" while the only testimony

offered in the case was that of the husband of one of the Complainants, a witness absolutely incompetent to testify at all in the cause, and one whose testimony, even if admissible, would be wholly insufficient, upon well settled legal principles, for the purpose in hand. See Matter of Heaton, 21 N. J. Eq., 221 : Lucas *vs.* Brooks, 18 Wall., 436.

4. Lots Twenty and Twenty-one, sale of which was assumed to be made, and conveyance of which is sought by the petition, were neither named in the bill nor embraced in the trust of the will, the decree for their sale resting upon no other foundation than the erroneous statement in the deposition of Mr. McBlair before the special Auditor that they were within the trust for the Complainants created by that instrument.

The District does not, and can not, claim any title to the consideration of the Court as being an innocent purchaser without notice. Mr. McBlair's want of title was apparent upon the record, and moreover, as the testimony in the case shows, the title was examined by counsel on its behalf. It is simply the assignee of McBlair, and can stand in no better position than his would be, if he were here asking the Court to reimburse him out of the estate for his expenditures upon the property, made without the authority of the Court or the consent of any of the parties, in accordance with his own plans, upon his own responsibility, and in defiance of the known wishes of at least one half of the parties in interest.

No title can be given by a purchaser under an imperfect judicial sale, though his grantee pays value.—Williamson *vs.* Presbyterian Congregation, 8, How., 565.

"In any sale under a decree or order in Chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order.—(Colclough *vs.* Sterum, 3, Bligh, 181 : Lutwiche *vs.* Winford, 2 Bro. C. C. 251.) If he takes a title under an imperfect sale, he must abide the consequence."—Williamson et. al. *vs.* Berry, 8 How, 495, 548.

The preceding citation is authority, if authority were needed, for the proposition that the rule thus declared applies equally to the assignee or grantee of such purchaser.

One or two points urged in the Brief for the Appellant below, and which will perhaps be renewed here, may justify brief reference.

One of these is the following statement: "McBlair put upon the market the bonds thus procured, securing on them loans amounting to $22,700. They were afterwards either sold to pay these loans, *or redeemed by Gadsby's estate out of its rents and profits. Either Gadsby's estate or its vendees still hold them.*"

The italicized portion of this quotation is purely a flight of fancy. No one of the bonds in question, and not a dollar of their proceeds, ever came into hands of the trustees of the Gadsby estate, or any representative of it.

It was further insisted below that, in decreeing payment of the claim of Williams and Gallant for so much of their work in repairing the old houses as McBlair left unpaid, the court ratified the operations of the latter, and adjudicated that the estate should pay for the alleged improvements contracted for by him.

What the Court adjudicated in reference to the claim of the Appellant is not left to inference. Its adjudication was, that the Appellant was not entitled to the conveyance sought. No inconsistency, and no error, in decreeing that the corpus of the estate, directed by the will to be kept intact for the remainderman, should nevertheless be diminished to pay for unauthorized repairs upon certain houses for the benefit, practically, of the life tenants, can obscure its express decision upon the question for consideration here.

The point principally relied upon below, however, was the technical one that the appeal from the decree of the special term passed August 7th, 1875, directing a conveyance to the District as prayed, was taken in the name of John H. McBlair only, and that, in the first place, he, not being a party to the cause, had no right of appeal at all, and, in the second, if he had such right, the reversal of the decree in question could be taken advantage of by him only, and could not enure to the benefit of the remaindermen, who are the present Appellees.

Omitting several obvious answers to the first of these objections, viz., that a mere purchaser at a judicial sale, not a party to the cause, is not entitled to an appeal, a conclusive

reply will be found in repeated decisions of this Court upon the subject. Blossom *vs.* Milwaukee R. R. Co., 655; Hovey *vs.* McDonald, 109 U. S., 150 and citations.

The second objection, viz., that the decree of Feb. 4, 1876, though wholly reversing the decree of the special term in question, nevertheless left it in force and operative as against all parties except McBlair, is also suggestive of numerous answers.

In the first place, the proposition that the Court itself, whose especial duty it is to guard the rights of infants, is precluded from doing so where a cause is regularly before it on appeal, because the infants were not formally Appellants, is believed to be wholly unsupported by authority, and has little to commend itself to the sense of expediency and right; especially where, as in the case at bar, a number of the infants were not served with process, and a majority of them were unprovided with a guardian *ad litem* to look after their interests as required.

"A party who occupies the position of a stake-holder, and by his answer submits to whatever judgment the Court may render in the case, need not join in an appeal or writ of error, but his rights will be protected by the Court."—Fowler *vs.* Merrill, 8 Tex., 154. *A fortiori*, the rule must be the same in the case of infants, whose interests the law itself submits to the protection of the Court, and who are incapable of personally complying with formal, technical requirements.

In the second place, the Court *exercised* the power of reversing the decree in question absolutely, and as to all the parties, and its decree to that effect, though final as to the present Appellant, has stood for ten years and more without appeal.

In the third place, while decrees disposing of *separable rights* of sundry parties, and appealed from by some of them only, have generally and properly been held to be conclusive upon those not appealing, that rule is, by physical necessity, inapplicable to the reversal of a decree for the performance of a single, inseparable act.

"When a judgment is severable, it may be reversed in part and affirmed in part; but a judgment which is an entirety against several parties, whether in tort or assumpsit, if reversed as to one, must be reversed as to all."—Powers *vs.*

Irish, 23 Mich., 429, citing Bac. Abr., Tit. "Error," (M); Sargent *vs.* French, 10 N. H., 444; Sheldon *vs.* Quinlen, 5 Hill, 441.

Where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question and equally affected by the same decree or judgment, the Court will settle the rights of the parties not appealing as well as those who bring up their case by appeal.—Walker *vs.* Page, 21 Gratt., 636, 653, and citations.

One of several persons against whom a joint decree is rendered may appeal, and carry up the whole case for review.—Peer *vs.* Cookerow, 14 N. J. Eq., 361, citing Johnson *vs.* Johnson, 1 Dana, 364, and Emerick *vs.* Armstrong, 1 Ham., 513.

Where the judgment or decree of a lower Court has been wholly set aside by the appellate tribunal, and the cause remanded, the case stands as if the reversed judgment or decree had never been rendered, and not only the successful Appellant, but other parties to the cause having claims similar to his, are entitled to proceed below as if the reversed judgment had never been entered.—Sullivan *vs.* Thomas, 6 S. C., 201.

Where the appeal is taken by one Defendant, but the decree will necessarily affect other Defendants who have not appealed, the appellate tribunal will treat the whole case as before it, as it was before the Chancellor. Grubb *vs.* Browder, 11 Heisk., 299; and see Parrott *vs.* Palmer, 3 Myl. & K, 632, 646.

Where several Defendants are sought to be charged upon the same demand, and the defense relied upon on appeal by one operates for the defense of all, it is error to reverse the judgment as to the answering or appealing Defendant, and leave it standing in full force as against the others.—Todd *vs.* Stambaugh, 37 Ohio St., 469.

One, and only one, of the foregoing citations, viz., the case in 21 Grattan, turns in part upon certain statutory provisions in the particular State; which, however, are no more to the point contended for than is section 772 of the Revised Statutes relating to the District of Columbia.

To the same effect appear to be all the authorities; all of